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88-1514

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEWSPAPERS OF NEW ENGLAND, INC.,
Petitioner

v.

CLERK-MAGISTRATE OF THE WARE DIVISION
OF THE DISTRICT COURT DEPARTMENT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTION PRESENTED FOR REVIEW

A reporter for the Transcript-Telegram, a newspaper published by petitioner, requested access to an affidavit in support of a search warrant. At the time of the request, the search had been made, the warrant returned to the Court, the criminal defendant had been arrested and arraigned; however, the grand jury had not yet returned an indictment. The affidavit was impounded, sua sponte, by the District Court Judge. In this context:

> Did the Supreme Judicial Court of the Commonwealth of Massachusetts err in holding that the First and Fourteenth Amendments to the Constitution did not give rise to a guaranteed right of access to the affidavit in support of a search warrant?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Newspapers of New England, Inc., and the respondent, Clerk-Magistrate of the Ware Division of the District Court Department. The District Attorney for the Northwestern District and Kenneth Phoenix, defendant in the underlying criminal action were named parties in the original action, but did not participate in the appeal before the Supreme Judicial Court.

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v.

CLERK-MAGISTRATE OF THE WARE DIVISION
OF THE DISTRICT COURT DEPARTMENT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioner, Newspapers of New England, Inc., respectfully prays that a writ of certiorari be issued to review the decision of the Massachusetts Supreme Judicial Court dated December 22, 1988.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts ("SJC") is reported at 403 Mass. 628, 531 N.E. 2d 1261 (1988) and is reproduced in the Appendix at pp. 1a-15a, infra.

The opinion of the Appellate Division of the District Court, Western Division (Appellate Division) is reproduced in the Appendix at pp. 16a-40a, infra.

The decision of the Ware Division of the District Court Department of the Trial Court (District Court) is produced in the Appendix at pp. 41a-47a, infra.

JURISDICTION

On December 22, 1988, the Supreme Court Judicial Court upheld the decision of the District Court impounding an affidavit in support of a search warrant, in its decision the Court held that petitioner did not have a constitutionally guaranteed right of access to said affidavit. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves portions of the First, Fourth and Fourteenth Amendments to the United States Constitution:

U.S. Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment XIV, § 1

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . .

STATUTES INVOLVED

Mass. G.L. c. 276 § 2B, reads in relevant part:

> A person seeking a search warrant shall appear personally before a court or justice authorized to issue search warrants in criminal cases and shall give an affidavit in substantially the form hereinafter prescribed. Such affidavit shall contain the facts, information, and circumstances upon which such person relies to establish sufficient grounds for the issuance of the warrant. The person issuing the warrant shall retain the affidavit and shall deliver it within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit shall be attached to it and shall be filed therewith, and it shall not be a public document until the warrant is returned.

28 U.S.C. § 1257(3):

> Final jurisdiction or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

On July 3, 1987, a Superior Court Justice issued a search warrant to search the home of Kenneth Phoenix in Belchertown, Massachusetts. Mr. Phoenix was a key suspect in the August 1986 murder of Raymond Green. On July 3, 1987, Phoenix was arrested for the murder. He was arraigned on July 6, 1987. The search warrant was returned to the Ware District Court on July 9, 1987, where it was placed on file.[1]

On July 10, 1987, a reporter for the *Transcript-Telegram*, a newspaper published in Holyoke, Massachusetts, with a circulation in several small surrounding towns, including Belchertown, requested access to the warrant and supporting affidavit. The Clerk-Magistrate refused access and consulted the presiding justice of the Court. The judge ordered sua sponte, that the warrant was subject to public review, but the affidavit upon which it was based was ordered impounded. (App. 41a-47a)

In accordance with the procedure established by the Supreme Judicial Court in *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 551, 362 N.E.2d 1189 (1977), the *Transcript-Telegram* through its corporate publisher commenced an action against the Clerk-Magistrate.

The District Court granted an expedited hearing. On August 10, 1987, the District Court judge entered her decision in which she found: (1) The affidavit in support of a search warrant is not a public record; (2) there is no constitutionally guaranteed right of access to such an affidavit, and (3) if there was a constitutionally guaranteed right of access, the accused's (Phoenix) right to a fair trial outweighed such right of access and justified the impoundment order. (App. 41a-47a) Plaintiff appealed the decision of the District Court.

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[1] The full text of the affidavit is set forth in the Appendix, 48a-59a.

The Appellate Division of the District Court, heard oral argument on October 14, 1987, and issued its Decision and Order April 28, 1988. (App. 16a-40a) The Appellate Division held that (1) the affidavit in support of a search warrant is a public record (App. 20a-22a), (ii) the plaintiff enjoyed a constitutionally protected right of access to the affidavit in question (App. 23a-32a), and (iii) the trial Court had properly balanced the newspaper's First Amendment rights against the right of the accused (Phoenix) to receive a fair trial. (App. 34a-37a) As a result of the above analysis, the Appellate Division affirmed the decision of the District Court. (App. 34a-37a).[2]

Plaintiff appealed the decision of the Appellate Division to the Appeals Court; the Supreme Judicial Court, on its own motion, took direct appellate review. The Supreme Judicial Court reaffirmed that the affidavit was a public record (App. 5a), but held that there was no constitutionally guaranteed right of access to the affidavit at the time the plaintiff requested it. (App. 1a, 12a-13a) Since the Court found no constitutionally protected right of access, the decision to impound the affidavit was a question of discretion for the Trial Court. (App. 1a, 12a-13a). The Court went on to hold that since the accused (Phoenix) had subsequently been convicted of first degree murder, further impounding of the warrant could serve no useful purpose. (App. 1a, 13a)

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[2] Judge Lenhoff issued a separate opinion labeled "Dissenting" in which he stated that the appeal should be dismissed on procedural grounds.

REASONS FOR GRANTING THE WRIT

I. The Controversy Which Is the Foundation of This Appeal Has Not Been Rendered Moot by the Subsequent Release of the Affidavit.

The Supreme Judicial Court, in its Decision and Order of December 22, 1988, found that the order impounding the affidavit no longer served any useful purpose and should be vacated. (App. 1a, 13a) That order did not resolve the underlying controversy. The dispute over the right to inspect affidavits in support of search warrants is not only capable, but likely of repetition. It can reasonably be assumed that the plaintiff, which publishes two newspapers in Western Massachusetts will someday be subjected to another order prohibiting access to an affidavit in support of a search warrant.[3]

In the present action, the plaintiff used a procedure which had been specifically adopted to provide expedited judicial review (App. 3a, n.2); however, the process was not of sufficient speed to obtain review prior to the conclusion of the criminal action. (App. 1a) *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Company v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*); and *Press-Enterprise Company v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise, II*), all presented disputes

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[3] In *Commonwealth v. Branch*, District Court of Franklin County, No. 88-CR-1963, the plaintiff's other Massachusetts newspaper, *The Greenfield Recorder* argued before the Greenfield District Court for the release of a warrant and affidavit in support thereof. The *Branch* case concerned a homicide investigation in which the Court had ordered the warrant and affidavit impounded. The above motion was filed and argued after the decision by the Appellate Division (App. 16a-40a), but prior to the decision of the Supreme Judicial Court. (App. 1a-15a) The Court held that the material should be released. That case did not present a Sixth Amendment fair trial issue because the accused had committed suicide.

which had been rendered technically moot by subsequent events. Yet, in each of these cases, this Court addressed the merits. The controversy presented herein is one of a recurring nature, which is likely to evade judicial review. It clearly falls within the standards previously articulated by this Court and is not moot. See e.g. *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-378 (1979); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 547 (1976); *Southern Pacific Terminal Co. v. I.C.C.* 219 U.S. 498, 515 (1911).

II. The Decision of the Supreme Judicial Court Is Contrary to Established Federal Precedent.

Beginning with *Richmond Newspapers, Inc. v. Virginia, supra*, this Court has handed down a series of cases dealing with access to judicial proceedings. *Richmond Newspapers, Inc., supra*, dealt with access to the criminal trial itself. *Globe Newspaper Company v. Superior Court, supra*, concerned a statute closing portions of a criminal trial. *Press-Enterprise Company v. Superior Court, supra* (*Press-Enterprise I*), concerned access to voire dire jury proceedings and a transcript of those proceedings. Finally, *Press-Enterprise Company v. Superior Court, supra* (*Press-Enterprise II*), dealt with access to preliminary, probable cause hearings. Each of the above cases held that there was a constitutionally protected right of access to judicial proceedings.

There is no dispute that the issuance of a search warrant, at least as practiced in Massachusetts, is a judicial proceeding. *Sibley v. Holyoke Transcript-Telegram Publishing Co.*, 391 Mass. 468, 471, 461 N.E.2d 823 (1984); however, the decision of which plaintiff seeks review holds that there is no constitutionally guaranteed right of access to documents which form the basis of such a proceeding.[4]

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[4] Plaintiff does not assert that there exists a right to attend the proceeding itself. There clearly exists a compelling governmental

The Supreme Judicial Court adopted a highly restricted view of established Federal precedent. Its decision is in direct conflict with a recent decision of the Eighth Circuit Court of Appeals. See *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988), and discussion *infra*. The Court focused upon the nature of the proceeding, and whether the proceeding was physically open to the public. (App. 9a-13a) The Supreme Judicial Court reasoned that since ". . . [t]he affidavit in question has no integral relationship with any particular pretrial proceeding to which the public enjoys a First Amendment right of access . . ." there was no constitutionally guaranteed right of access to the document in question. (App. 10a, 12a) The Supreme Judicial Court decision clearly links the right of access to documents to the right of access to places.[5] Under the above analysis, the plaintiff would have a constitutionally protected right of access to an affidavit if it becomes the subject of a hearing on a motion to suppress or if introduced at trial, but has no constitutionally guaranteed right of access to the document while it remains in the Clerk's office.[6]

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interest in maintaining the confidentiality of the issuance of a warrant until the search has been completed. Mass. G.L. c. 276, § 2B, recognizes and provides for that compelling interest by requiring that the affidavit be kept separate until the warrant is returned. ". . . and it shall not be a public document until the warrant is returned." Mass. G.L. c. 276, § 2B.

[5] The Supreme Judicial Court may be basing its results on a Sixth Amendment analysis rather than the First Amendment. (See App. 10a, n.10) Compare *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) to *Richmond Newspapers, Inc. v. Virginia, supra*, and its progeny.

[6] Consider the quandary of a defense counsel in a criminal action who is faced with a prejudicial affidavit. If he files and argues a motion to suppress, he runs the risk of the affidavit being made public. Whereas, if he does nothing, the affidavit remains in the Clerk's files, subject to the Court's exercise of discretion.

The linking of access to documents to physical access to proceedings ignores two important factors. First, the right of access to judicial records exists independent of physical access to the proceeding; and second the issuance of the search warrant is part of the overall criminal prosecution. The lack of physical access to the proceeding is designed to protect a legitimate, short-term state interest. It is not designed to inhibit the public's right to inquire into the activities of the judiciary.

The Courts of this country have long recognized a generalized right to inspect and copy public records, including judicial records and documents. See, *e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *United States v. Criden*, 648 F.2d 814 (3rd Cir. 1981); *United States v. Myers*, 635 F.2d 945 (2nd Cir. 1980). In *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), rev'd on other grounds sub nom. *Nixon v. Warner Communications, supra*, the Court of Appeals emphasized the principle that the common law right to inspect and copy judicial records is fundamental in a democracy. Some courts have suggested that the right of access to judicial records predates the Constitution. See *e.g.*, *United States v. Criden*, 648 F.2d at 819.

Numerous Federal circuits have established a First Amendment right of access to records submitted in connection with criminal proceedings.[7] These courts have reasoned that without access to such documents, the pub-

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[7] See, e.g., *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (documents filed in pretrial proceedings); *In Re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (documents filed in connection with plea and sentencing hearings); *Matter of The New York Times Co.*, 828 F.2d 110, 114 (2nd Cir. 1987) (documents filed in connection with pretrial suppression hearings), *cert. denied*, —— U.S. ——, 108 S.Ct. 1272 (1988); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *United States v. Smith*, 776 F.2d 1104, 1111 (3rd Cir. 1985) (bill of particulars).

lic often would not have a "full understanding" of the proceeding and therefore would not always be in a position to serve as an effective check on the system. *In re Globe*, 729 F.2d 47, 52 (1st Cir. 1984) (quoting *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983)).

The Courts of the Commonwealth of Massachusetts have recognized that the issuance of warrants are judicial proceedings, and the ability of the public to scrutinize the activities of its courts in connection with such proceedings is an important public concern. See *e.g.*, *Thompson v. Boston Publishing Co.*, 285 Mass. 344, 189 N.E. 210 (1934); *Thompson v. Globe Newspaper Co.*, 279 Mass. 176, 181 N.E. 249 (1932); *Cowley v. Pulsifer*, 137 Mass. 392, 394, 50 Am. R. 318 (1884). In *Sibley v. Holyoke Transcript-Telegram Publishing Co., Inc.*, 391 Mass. 468, 471-472, 461 N.E.2d 823 (1984), the Supreme Judicial Court stated:

> This qualified privilege (to comment fairly and accurately upon judicial proceedings) is justified not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself . . . as to the mode in which a public duty is discharged [citing *Cowley v. Pulsifer*, 137 Mass. 392, 394, 50 Am. R. 318 (1884)] . . . the purpose of the privilege is to ensure publications may perform the important function of informing the public of actions taken by the Courts. *Sibley, supra* at 471-472.[8]

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[8] When comparing *Sibley, supra* with the case at bar, one is left with the odd result that public interest requires that the media be given substantial insulation against liability in order to inform the public; however, there is no constitutionally guaranteed right of access to the information necessary to perform the task.

Richmond Newspapers, Inc. v. Virginia, supra, and its progeny clearly hold that the public enjoys a constitutionally protected right of access to information about the operation of their government, including the Judicial Branch. The distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues. *Press-Enterprise, I, supra* at 516, Stevens concurring. Clearly, there are governmental activities which require some degree of secrecy. However, a short-term requirement of secrecy does not vitiate the general First Amendment principles articulated above.

The Supreme Judicial Court decision places too great a weight on the fact that the search warrant proceeding is closed. The lack of physical access to the proceeding is designed to protect a legitimate, short-term state interest. Once the search has been completed, the reason for secrecy ceases to exist.[9] The fact that access is restricted during issuance and search does not forever cloak the proceeding in secrecy.

The Supreme Judicial Court's review of the historical right of access focuses on the historical right of access to the proceeding itself. Since the proceeding has traditionally been closed, the Court felt no further consideration was required. (App. 9a-10a) The Supreme Judicial Court failed to review the historical right of access to the underlying documents. Clearly, there has been a tradition of access to search warrant affidavits. If there were not, cases such as *Sibley v. Holyoke Transcript-Telegram Publishing Co., Inc., supra*; *Thompson v. Boston Publishing Co., supra,* and *Thompson v. Globe News-*

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[9] The fact that access is obtained after the completion of the search does not erase the beneficial effect on a criminal proceeding. The ". . . present prospect of future access is a felt presence, just as the prospect of appellate review is for lawyers and judge in the trial of a case." *Globe Newspaper Company v. Pokaski,* —— F.2d ——, No. 88-1413, p. 14 (1st Cir. 1989).

paper Co., supra, would not exist. Even the manner in which Mass. G.L. c. 276, § 2B is drafted demonstrates that the Legislature considered the affidavit to be a public record, generally available for inspection. The statute does not provide that the affidavit will become a public record, rather it states ". . . it shall not be a public document until the warrant is returned." Mass. G.L. c. 276, § 2B. The statute is written to restrict access, not create it.

The decision of the Supreme Judicial Court is in direct conflict with a recent decision of the Eighth Circuit Court of Appeals. In *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988) the Eighth Circuit Court of Appeals was presented with the identical issues to that at bar.

In *In re Search Warrant for Secretarial Area Outside Office of Gunn, supra*, the Pulitzer Publishing Co., the publisher of the St. Louis Post-Dispatch filed a motion to unseal documents supporting the issuance of a search warrant executed as part of an ongoing investigation into alleged bribery in the defense industry. The United States District Court for the Eastern District of Missouri denied the motion. The Court of Appeals held that there was a First Amendment right to public access to an affidavit in support of a search warrant. *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 573.

The Government argued, and the Court noted, that historically the process of issuing search warrants involved ex parte, in camera proceedings; however, lack of physical access to the proceeding was not the deciding factor. The Court reasoned:

> We are persuaded that the first amendment right of public access does extend to the documents filed in support of search warrant applications. First, although the process of issuing search warrants has

> traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal. Under the common law judicial records and documents have been historically considered to be open to inspection by the public. . . . (Citations omitted) Second, public access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct. 855 F. 2d at 573.

The Supreme Judicial Court has ignored the fact that the search warrant proceeding is part of the overall criminal process. The trial court did not impound the warrant, and there has been no suggestion that the warrant could or should have been impounded. The public has been allowed full access to the judicial decision (the warrant), but has been denied access to the basis for the decision (the affidavit). One of the purposes for public access to judicial proceedings is to promote a better understanding of the judicial process. *Associated Press v. United States District Court*, 705 F.2d at 1145. The present case holds that the public has the right to see the final decision but is not entitled to see the reason for the decision. Such a rationale does nothing to promote public understanding and review of the judicial system; if anything, it creates suspicion.[10] Doubtless, public access to pre-trial documents may on occasion cause inconvenience to Courts, . . . "The greater wrong, however, would be to shroud in secrecy, for want of publication, the government's scrutiny of its citizens." *Sibley*, 391 Mass. at 472, 461 N.E.2d 823 (1984).

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[10] "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc.*, 448 U.S. at 572.

III. The Opinion by the Supreme Judicial Court Is Contrary to the Historical Foundations of the Fourth Amendment.

The opinion of the Supreme Judicial Court clearly provides that the existence of a right of access to judicial documents is dependent upon the proceeding which generates or makes use of the document. (App. 10a-13a) Under this rationale, there is no constitutionally guaranteed right of access to the records underlying the issuance of a warrant unless those records become the subject of a further judicial proceeding, such as a motion to suppress. If there is no further proceeding, the affidavit could remain forever sealed, if a judge, in the exercise of his or her discretion, so elects.[11] Such a rationale is inconsistent with the very purposes for which the Fourth Amendment was authored.

Prior to the American Revolution, there existed a practice in England and the Colonies of issuing writs of assistance granting to government officials the power to conduct general searches. This practice originated in the secret Star Chamber proceedings of Tudor England. The practice had been severely criticized in England. See *Entick v. Carrington and Three Other King's Messengers*, 19 Howell's State Trials 1029. However, the writs of assistance continued to be used in the colonies, espe-

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[11] Clearly, the defendant in a criminal action and the prosecution would have a right of access. However, if no criminal charges resulted or if the direct parties to the criminal action chose not to make further use of the affidavit, the Supreme Judicial Court decision holds that the public has no independent, constitutionally protected right of access. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." *Richmond Newspapers, Inc.*, 448 U.S. at 569, quoting J. Bentham, Rationale of Judicial Evidence, 524 (1827).

cially the City of Boston. It was against this historical backdrop that the Fourth Amendment was authored.[12]

The Fourth Amendment prohibited the issuance of general warrants and provided that the issuance of warrants would rest with the judiciary. As Mr. Justice Day writing for the Court in *Weeks v. United States*, 232 U.S. 383 (1914) stated:

> The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. *Weeks v. United States, supra* at 391-392.[13]

Under the rationale articulated by the Supreme Judicial Court, the public has no constitutionally guaranteed right to satisfy itself that the above-stated purposes are being fulfilled. Such a rationale is not logical, conflicts with the purpose of the Fourth Amendment and indeed conflicts with established Massachusetts precedent. The decision in this action leaves the public with a no constitutionally guaranteed right of access to important judicial proceedings and thereby the ability to satisfy itself that the mandates of the Fourth Amendment are being followed.

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[12] For a more extensive discussion of the historical foundations of the Fourth Amendment, see the opinion of Mr. Justice Bradley speaking for the Court in *Boyd v. United States*, 116 U.S. 616, 624-629 (1886); see also *Weeks v. United States*, 232 U.S. 383 (1914).

[13] *Weeks, supra*, speaks only in terms of the "United States and Federal Officials" because it predates *Wolf v. Colorado*, 338 U.S. 25 (1949) which applied the Fourth Amendment to the States.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.[14]

Respectfully submitted,

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[14] Plaintiff also argued that the lower court's impoundment order did not meet the constitutional standards established in *Press-Enterprise II, supra*; (i.e., a failure to make specific findings demonstrating that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and reasonable alternatives to closure cannot adequately protect the defendant's free trial rights. *Press-Enterprise, II*, 478 U.S. at 14-15.) However, since the Supreme Judicial Court found that there was no constitutionally protected right of access, the Court never reached that issue.

APPENDIX

APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

IN THE CASE NO. SJC-4811

December 22, 1988.

NEWSPAPERS OF NEW ENGLAND, INC.

vs.

CLERK-MAGISTRATE OF THE WARE DIVISION OF THE DISTRICT COURT DEPARTMENT & others.

pending in the Ware Division of the District Court Department of the Trial Court for the County of Hampshire No. ——

ORDERED, that the following entry be made in the docket; viz.,—

We conclude that no constitutionally guaranteed right of access to the affidavit existed at the time the plaintiff requested it, and that the District Court judge did not abuse her discretion in impounding the affidavit. No issue is raised before us concerning the breadth of the impoundment order. However, in light of the fact that Phoenix has been convicted after a trial which received substantial media coverage, it is clear that no basis now exists for the continued impoundment of the affidavit, and, therefore, the impoundment order is dissolved.

BY THE COURT,
/s/ Jean M. Kennett
Clerk

December 22, 1988

See opinion on file.

Hs-4811 S.J.C.

NEWSPAPERS OF NEW ENGLAND, INC.

vs.

CLERK-MAGISTRATE OF THE WARE DIVISION OF THE DISTRICT COURT DEPARTMENT & others.[1]

Hampshire. September 13, 1988. December 22, 1988.

Present: Hennessey, C.J., Wilkins, Abrams, Nolan, & Lynch, JJ.

Public Record. Practice, Criminal, Impoundment order, Fair trial, Public trial. *Constitutional Law,* Public trial, Freedom of speech and press, *Impoundment* order. *Search and Seizure,* Warrant, Affidavit.

Civil action commenced in the Ware Division of the District Court Department on July 14, 1987.

The case was heard by *Ann M. Gibbons,* J.

Raymond R. Randall for the plaintiff.

H. Reed Witherby, Assistant Attorney General, for the Clerk-Magistrate of the Ware Division of the District Court Department.

James C. Heighman, for Massachusetts Newspaper Publishers Association, amicus curiae, submitted a brief.

LYNCH, J. The plaintiff, Newspapers of New England, Inc., filed an action in the Ware Division of the District Court Department, challenging a judge's order impounding an affidavit in support of a search warrant issued in the course of an investigation which ultimately led to the indictment and conviction of Kenneth Phoenix

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[1] District Attorney for the Northwestern District, and Kenneth Phoenix. Neither the district attorney nor Phoenix is a party to this appeal.

for murder in the first degree.[2] The judge had impounded the affidavit during the pendency of the criminal proceedings against Phoenix. The judge who impounded the affidavit reported this action to the Appellate Division of the District Court,[3] which upheld the impoundment order. The plaintiff appealed, and we transferred the case to this court on our own motion. We conclude that, at the time the order was issued, the judge did not abuse her discretion in impounding the affidavit.[4]

There is no material dispute concerning the facts. On July 3, 1987, police arrested Kenneth Phoenix for the August 4, 1986, murder of Raymond Green, and Phoenix was arraigned in the District Court on July 6, 1987. Prior to the arrest, a Superior Court judge had issued a search warrant which was executed and later returned to the Ware District Court on July 9, 1987.

On the day the warrant was returned, a reporter for the Holyoke Transcript-Telegram, a newspaper published by the plaintiff, requested access to both the search warrant and the affidavit. The clerk-magistrate allowed the

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[2] The plaintiff commenced the action according to the procedures established in *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 551 (1977).

[3] In *Ottaway Newspapers, Inc.* v. *Appeals Court, supra*, we noted that an action filed challenging an impoundment order will end in a judgment appealable under "ordinary rules." While an appeal under "ordinary rules" may be different from a report to the Appellate Division pursuant to Dist./Mun. Cts. R. Civ. P. 64 (1988), we need not decide the issue since it was neither briefed nor argued. Mass. R. A. P. 16(a)(4), as amended, 367 Mass. 921 (1975). See Rule 8 of the Rules of the Trial Court (1988); Rule 12 of the Uniform Rules of Impoundment Procedure (1988); S.J.C. Rule 1:15, 401 Mass. 1301 (1988).

[4] Since there has been a public trial which resulted in the conviction of Phoenix and since the plaintiff does not now seek, nor Phoenix oppose, the disclosure of the affidavit the case is clearly moot. At the request of the parties and because of the strong public interest in the matter we nevertheless decide the case.

reporter to see the search warrant, but denied access to the affidavit. After another request on July 10, 1987, a judge held an open hearing at which the plaintiff's counsel requested access to the affidavit claiming it was a public record. Neither the Commonwealth nor Phoenix had filed a motion to impound. The District Court judge ruled that, even if the newspaper had a legal right of access to the affidavit, that right must be balanced against Phoenix's right to a fair trial in a pending case. After reviewing the affidavit and balancing these competing rights, the judge, sua sponte, ordered the affidavit impounded. Although Phoenix had been arrested and arraigned in the District Court, neither he nor his counsel was present at the July 10, 1987, impoundment hearing.

On July 14, 1987, the plaintiff commenced the present action challenging the judge's July 10, 1987, impoundment order. A hearing was held on July 21, 1987, at which the judge upheld her earlier decision to impound the affidavit. Although the judge ruled that the affidavit was not a public record and the newspaper did not have a present legal right of access, she further ruled that, even if there were such a right, after balancing the right of access against Phoenix's fair trial rights and considering corrective alternatives, justice required impoundment. Phoenix was represented at this hearing and opposed the plaintiff's request that the order of impoundment be vacated.[5] The Appellate Division ruled that, although the newspaper had a right of access under the First Amendment to the United States Constitution to the affidavit, the impoundment order satisfied constitutional standards.

The plaintiff maintains its right to immediate access to the affidavit upon its return to and filing with the

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[5] At the time this hearing was held, the defendant had yet to be indicted on the murder charge. Also, the requested access was prior to any suppression or other pretrial hearing at which the affidavit or its contents may have been at issue.

court. We first decide whether the impoundment order was correct under our statutory or common law and only then, if necessary, do we decide if any constitutional principles are affected.

1. *Public record.* The judge ruled that an affidavit in support of a search warrant is not a public record, and, therefore, the plaintiff had no present right of access. However, G. L. c. 276, § 2B (1986 ed.), provides in relevant part: "Upon the return of said warrant, the affidavit shall be attached to it and shall be filed therewith, and it shall not be a public document until the warrant is returned." On its face the statute provides, in effect, that, once the warrant and affidavit have been returned to the court, they become public documents.

The affidavit's status as a "public" document does not rest entirely on G. L. c. 276, § 2B. The Federal courts have recognized a generalized right of access to public records, including judicial records and documents. See, e.g., *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *United States* v. *Criden*, 648 F.2d 814 (3d Cir. 1981); *Application of Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980). Our prior decisions also espouse a "general principle of publicity" applicable to judicial proceedings.[6] *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977), quoting *Commonwealth* v. *Blondin*, 324 Mass. 564, 571 (1949), cert. denied, 339 U.S. 984 (1950). On filing with the court the affidavit is a public document both under the statute and the common law.

2. *Impoundment authority.* The fact that search warrant affidavits are "public records" does not mean that a court lacks impoundment authority. As we have said

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[6] In *Sibley* v. *Holyoke Transcript-Telegram Publishing Co.*, 391 Mass. 468, 471 (1984), we held that the issuance of a search warrant, whether by a judge or by a clerk, involves the exercise of judicial discretion and constitutes a "judicial proceeding."

recently: "It is within the discretion of a court to impound its files in a case and to deny public inspection of them, and that it is often done when justice so requires." *H.S. Gere & Sons* v. *Frey*, 400 Mass. 326, 329 (1987), quoting *Sanford* v. *Boston Herald-Traveler Corp.*, 318 Mass. 156, 158 (1945). See *George W. Prescott Publishing Co.* v. *Register of Probate for Norfolk County*, 395 Mass. 274, 277 (1985); *Ottaway Newspapers, Inc.* v. *Appeals Court*, *supra* at 546; Rule 8 of the Rules of the Trial Court; Uniform Rules of Impoundment Procedure (1988). The plaintiff concedes that the judge possessed inherent authority to impound the affidavit, but questions the appropriateness of her doing so in the present case.

In *H.S. Gere & Sons*, *supra*, the plaintiff sought relief from an impoundment order sealing the entire file, including the settlement agreement, in a civil case. There we stated that the judge must balance the parties' privacy concerns against the "general principle of publicity." *Id.* at 329. Through this balancing process, "a judge must determine whether 'good cause' to order impoundment exists and must tailor the scope of the impoundment order so that it does not exceed the need for impoundment." *Id.*, citing *Ottaway Newspapers, Inc.* v. *Appeals Court*, *supra* at 550 n.17 (the scope of an impoundment order should not exceed the need). See Rule 8 of the Rules of the Trial Court; Rule 7 ("good cause" requirement) and Rule 8 (order must specify material to be impounded and duration) of the Uniform Rules of Impoundment Procedure. It should be noted, however, that in this case the judge was not balancing the competing interests of publicity against privacy but rather balancing publicity against a defendant's right guaranteed by the Sixth Amendment to the United States Constitution to a fair trial.

Protecting a defendant's right to a fair trial is undeniably a substantial government interest. *Press-*

Enterprise Co. v. *Superior Court*, 464 U.S. 501, 508 (1984) (*Press Enterprise I*) ("No right ranks higher than the right of the accused to a fair trial"). In *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), the Supreme Court emphasized the importance of a defendant's fair trial right when considering a claim of access to a pretrial suppression hearing. The Supreme Court stated, *supra* at 378: "This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. . . . To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." (Citations omitted.)[7]

Here, the plaintiff asserts its right of access to the affidavit immediately upon its filing in court, prior to Phoenix's being indicted, prior to any suppression hearings, and presumably prior to the defendant or his attorney's having an opportunity to read it. Furthermore, it is to be noted that the murder took place in a small rural community where the murder, the year-long investigation, and the arrest of Phoenix received extensive news media coverage. See *Columbia Broadcasting Sys., Inc.* v. *United States Dist. Court*, 729 F.2d 1174, 1181 (9th Cir. 1983) ("Almost all the cases in which the Supreme Court has found that press coverage deprived the defendant of a fair trial have been tried in small rural communities"). See also *Sheppard* v. *Maxwell*, 384 U.S. 333,

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[7] In *Gannett Co., supra* at 392-393, the Supreme Court upheld Judge DePasquale's decision to close a suppression hearing to the public and media. Although the Court might have decided *Gannett Co.* differently if the case had arisen subsequent to its decisions in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (First Amendment right of public to attend criminal trials); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982) (same); *Press-Enterprise I, supra* (voir dire proceedings); *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (preliminary hearings as conducted in California), the Court's observations regarding the importance of a defendant's fair trial right and a court's affirmative duty to protect that right still apply.

361 (1966) ("Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused"). The judge's findings demonstrate that she relied on the nature of the community; the prearrest, investigatory nature of the information contained in the sixteen-page affidavit; the multiplicity of sources for the information contained in the affidavit; that some of the information may be suppressible or inadmissible at trial and that a warrant need only be supported by a showing of probable cause.

We conclude that good cause existed for impounding the affidavit on July 10, 1987, and, therefore, there was no common law or statutory impediment to her action.[8]

3. *First Amendment right of access.* In challenging the impoundment order the plaintiff argues that the First Amendment, applicable to the States through the Fourteenth Amendment to the United States Constitution, provides a qualified constitutional right of access to the affidavit that can be denied only on a showing of a compelling governmental interest. The plaintiff relies on a quartet of recent Supreme Court decisions articulating a First Amendment right to open criminal proceedings. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555

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[8] In *George W. Prescott Publishing Co.* v. *Register of Probate for Norfolk County*, 395 Mass. 274, 279, 282 (1985), we ruled that, although an impoundment order is ordinarily within the sound discretion of the trial judge, when the documents concern a public official's conduct in office, they may be impounded only on a showing of "overriding necessity" based on specific findings. This heightened standard was based in part on our recognition that public officials have significantly diminished privacy interests with respect to information relevant to their conduct in office. *Id.* at 278. In the present case, however, the judge was not balancing the publicity interest against a public official's privacy interest but rather the publicity interest against a defendant's fair trial interest, and therefore the "overriding necessity" standard is inapplicable.

(1980). *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982). *Press-Enterprise I*, *supra*. *Press-Enterprise II*, *supra*. See note 7 *supra*.

None of the four Supreme Court decisions dealt with the right of access to pretrial, prearrest investigative documents but rather the First Amendment claim in those cases was based on a right of access to the actual criminal proceeding in question.

In *Richmond Newspapers, Inc.*, *supra* at 580, the Court held that the First Amendment guaranteed the public right to attend criminal trials. In *Globe Newspaper Co.*, *supra* at 611 & n.27, the Court struck down a rule of automatic mandatory closure of the courtroom during the testimony of minor victims in a sexual offense trial. The Court then concluded that the First Amendment right of access to a criminal trial included a voir dire hearing in the course of trial. *Press-Enterprise I*, *supra* at 505-510. Finally, in *Press-Enterprise II*, *supra* at 10, 12, the Court held that the right of access applied to a preliminary hearing conducted in California, noting that "public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal system" and "California preliminary hearings are sufficiently like a trial to justify the same conclusion."

These cases articulate a two-part test for determining whether a First Amendment right of access applies to any particular proceeding. First, the proceeding must have an historic tradition of openness, and second the public's access must play "a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, *supra* at 8. In applying this test to claims of a constitutional right of access to judicial documents, some courts have looked to the proceeding to which the documents relate.[9] See, e.g., *Press-Enterprise II*, *supra*

[9] The plaintiff concedes that the proceedings at which search warrants are issued have not been traditionally open and does not

at 10-13 (right to transcript of preliminary hearing based on right of access to hearing itself); *Press-Enterprise I*, *supra* at 513; (right to transcript of voir dire based on right of access to voir dire itself); *Matter of the New York Times Co.*, *supra* at 114 (access to documents filed in connection with pretrial suppression motion based on access to hearing); *In re Washington Post Co.*, 807 F.2d 383, 389-390 (4th Cir. 1986) (First Amendment right of access to plea and sentencing hearings carries with it right to documents filed in connection with the hearing); *Associated Press* v. *United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (access to pretrial proceedings carries with it right to pretrial documents). The affidavit in question has no integral relationship with any particular pretrial proceeding to which the public enjoys a First Amendment right of access.

Nixon v. *Warner Communications, Inc.*, 435 U.S. 589 (1978), is the only Supreme Court decision dealing with the more narrow issue of a constitutional right of access to court records outside the confines of a criminal proceeding. There, the Court rejected the claim that the First Amendment mandated the release of the "Watergate tapes" played at trial.[10] *Id.* at 608-610. In *United States* v. *Hickey*, 767 F.2d 705, 709 (10th Cir. 1985), the United States Court of Appeals for the Tenth Circuit relied on *Nixon* in rejecting a First Amendment right of

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assert any right to attend those proceedings. Additionally, in *Press-Enterprise II*, *supra* at 9, the Supreme Court emphasized that "there are some kinds of government operations that would be totally frustrated if conducted openly," citing grand jury proceedings as an example. For obvious reasons, proceedings at which a judge or clerk issues a search warrant fall squarely within the same category.

[10] One authority suggests that one factor which may account for the right of access distinction between records and criminal trials or proceedings is that the Sixth Amendment guarantees a public trial. See L. Tribe, American Constitutional Law § 12-20, at 959 (2d ed. 1988).

access claim to a sealed plea bargain agreement and held that only a common law right of access existed with regard to judicial records.

Two courts have addressed the issue of a First Amendment right of access to search warrant affidavits, and have come to opposite conclusions. In *Seattle Times Co.* v. *Eberharter*, 105 Wash. 2d 144 (1986), the plaintiff sought access to a search warrant affidavit filed with the court. The Supreme Court of Washington held that a common law and not a First Amendment standard governed the sealing of a search warrant affidavit in a case where a criminal complaint had yet to be filed. *Id.* at 147. Applying the two-part test to determine whether a First Amendment right of access exists, the court ruled: (1) "Unlike trials, the historical record reveals no English or American tradition of public access to search warrants," and (2) "review will occur when the prosecution attempts to introduce, at trial, evidence obtained as a result of this probable cause determination . . . [and] immediate public access is not required for the effective functioning of the process itself." [11] *Id.* at 152-153. On the other hand, the United States Court of Appeals for the Eighth Circuit recently divided on the question while upholding the judgment of the District Court denying access to a

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[11] The court in *Eberharter* was careful to limit its ruling to prearrest affidavits and indicated that an impoundment order should be reevaluated upon the filing of criminal charges. We note, however, that the effectiveness of the check on judicial conduct provided by a constitutionally protected right of public access to a search warrant affidavit is not seriously diminished if that right does not attach until a time when the affidavit is intergrally related to a proceeding in which the public enjoys a First Amendment right of access. On the other hand, where one of the primary purposes of impounding a search warrant affidavit is to protect a criminal defendant from prejudicial pretrial publicity, requiring disclosure at such an early stage of the prosecution may make that protection virtually impossible.

search warrant affidavit.[12] *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988). We think the opinion of the Supreme Court of Washington hews more closely to the principles enunciated by the Supreme Court.

Furthermore, it is not to be forgotten that, in the present case, Phoenix's Sixth Amendment right to a fair trial is being invaded by disclosure and that, when the plaintiff first asserted its right of access to the search warrant affidavit, Phoenix had yet to be indicted or subject to any criminal proceeding where the affidavit was in issue. There can be no doubt that in appropriate circumstances a defendant can require the closure of a pretrial suppression hearing and the impoundment of the documents involved in that hearing. *Press-Enterprise II*, *supra* at 14-15. It would therefore appear to be contrary to a defendant's inchoate rights to conclude that First Amendment rights of public access attach to documents inculpating a defendant at such an early stage in the proceeding so as to deprive or seriously impair a defendant's ability to assert those rights.

We, therefore, conclude that no constitutionally guaranteed right of access to the affidavit existed at the time

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[12] Judge McMillan, writing for the court, said that a First Amendment right attached upon the filing of the affidavit but concluded that the District Court judge had satisfied the constitutional requirements for impounding the affidavit. *In re Search Warrant For Secretarial Area Outside Office of Gunn, supra* at 572-573. Judge Bowman agreed that the warrant affidavit should be impounded but noted that since the common law right of access would yield the same result and "represents a workable and reasonable approach to the problem of balancing the public interest in immediate access against the competing public interest in fair and effective criminal investigations," the court should not decide the First Amendment claim. *Id.* at 575-576 (Bowman, J., concurring). Judge Heaney dissented, but agreed that the First Amendment applied and in reliance on facts not found by the District Court judge he concluded that the impoundment was not justified. *Id.* at 578 (Heaney, J., concurring and dissenting).

the plaintiff requested it, and that the District Court judge did not abuse her discretion in impounding the affidavit. No issue is raised before us concerning the breadth of the impoundment order. However, in light of the fact that Phoenix has been convicted after a trial which received substantial media coverage, it is clear that no basis now exists for the continued impoundment of the affidavit, and, therefore, the impoundment order is dissolved.

So ordered.

WILKINS, J. (concurring). This case deals with a claim of access to an affidavit asserted after a search warrant had been executed and returned to court and after criminal proceedings had been commenced. The newspaper makes no claim under the State Constitution. By statute and common law, the affidavit was public. In my view the judge's duties with respect to impoundment do not depend on whether there is a First Amendment right of access to such a document.

In many instances, there are clear governmental interests in the nondisclosure of the contents of such a filed affidavit, particularly prior to the completion of an investigation. It seems important in this respect that the prosecutor did not initially seek impoundment of the affidavit. In the face of a statute that made the affidavit public, I question whether a clerk-magistrate had any right to deny access to it. Although perhaps a judge could make an impoundment order on her own motion, in general the question of impoundment is one that a prosecutor should raise in protection of the government's interest and that a defendant (or target of the search) could raise in protection of his interests.

A judge confronted with a motion to impound or to lift an impoundment order must consider and decide the case on its particular facts. See Uniform Rules of Impoundment Procedure (1988); Rules 7 and 8 of the Rules of the Trial Court (1988). Cf. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 609 (1982) (mandatory rule closing trial is unconstitutional). No general principle, articulated in support of impoundment, can justify an impoundment without case-specific fact-finding. See *Globe Newspaper Co.* v. *Superior Court*, 383 Mass. 838, 852-853 (1981) (Wilkins, J., concurring), rev'd, 457 U.S. 596 (1982). Here, the judge's reason in support of impoundment was based solely on the threat to the criminal defendant's right to a fair trial, if any part of the affidavit were to be disclosed. The motion judge

had to support such a conclusion by showing what facts would be unfairly prejudicial and how the criminal defendant's rights could not be reasonably protected other than by impoundment. Cf. *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 14 (1986) (access to preliminary criminal proceeding). Such findings and rulings themselves might have to be impounded in whole or in part. The facts the judge relied on (the sparcity of the local population; the fact the warrant was issued on only a showing of probable cause; and the fact that certain information in the affidavits came from many sources, would be suppressible, or would be inadmissible at trial) do not, without more, justify the impoundment.

The adverse consequences of disclosure of the contents of the affidavit would seem likely to have paled in comparison with the consequences of the disclosure, already made, that the criminal defendant had been charged with murder in the first degree. Could the affidavit have been redacted? Would not careful jury selection procedures at the time of trial, months later, eliminate any possible prejudice to the criminal defendant's right to a fair trial?

The question is now moot. We all agree the order should be dissolved. Thus there is no reason to seek new findings made on a proper standard. It would seem that an impoundment order such as was issued here should include a provision that it will automatically be dissolved at least as early as the conclusion of the criminal proceedings.

COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURTS
WESTERN DISTRICT

No. 490

NEWSPAPERS OF NEW ENGLAND, INC.

vs.

JAMES H. BLOOM, CLERK/MAGISTRATE, *et al.*

[Filed Apr. 28, 1988]

In Ware Division:

Jusice: Gibbons, J.

Date of Finding or Decision Appealed: August 10, 1987

Docket No.: 87-161

Date of Entry in Appellate Division: September 16, 1987

In Appellate Division:

Justices: Larkin, J., McGuane, J., Lenhoff, J.

Sitting at: Holyoke

Date of Hearing: October 14, 1987

Date Opinion Certified: April 28, 1988

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COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURTS
WESTERN DISTRICT

HAMPSHIRE, SS. APPELLATE DIVISION

TRIAL COURT, WARE DIVISION

No. 87-161

NEWSPAPERS OF NEW ENGLAND, INC.

vs.

JAMES H. BLOOM, CLERK/MAGISTRATE, *et al.*

DECISION AND ORDER

This cause came on to and was heard in the Appellate Division for the Western District sitting at Holyoke upon an appeal from the Ware Division.

IT IS HEREBY ORDERED:

That the Clerk of the Ware Division make the following entry in said case on the Docket of said Court, to wit, Judgment Affirmed Report Dismissed.

/s/ Frank Larkin
LARKIN, J.

/s/ Allan M. McGuane
MCGUANE, J.

(Dissent Filed by)

/s/ Bernard Lenhoff
LENHOFF, J.

Opinion filed herewith
A true copy: ATTEST:

/s/ Evelyn R. Donohue
Clerk, Appellate Division

OPINION

Larkin, J.

This case raises issues concerning a putative right of access to certain pre-trial papers generated in connection with a prospective criminal proceeding. It involves the always delicate attempt to accommodate the competing interests of the public's "Right to Know" with a defendant's right to a criminal trial devoid of unwarranted and corrosive prejudicial pre-trial publicity. The factual context from which these issues arise is as follows:

Early in July 1987, one Kenneth Phoenix was arrested and charged with murder in the Town of Belchertown. Prior to the arrest, a search warrant was issued by a judge of the Superior Court on July 3, 1987. The warrant and affidavit were returned to the Ware District Court where they presently remain on file. On July 10, 1987, the District Court judge on her own motion ordered the affidavit impounded. Neither the District Attorney's office nor the defendant had requested impoundment.

In due course, and in accordance with the procedure set forth in *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 551 (1977), the plaintiff newspaper commenced the present action seeking access to the affidavit. The District Court held an expedited hearing at which the defendant (Phoenix) supported the impoundment position. On August 10, 1987 the Court issued a comprehensive Memorandum of Decision concluding that the Order of Impoundment was valid.

The Court's Decision of August 10, 1987 made detailed findings, setting forth the factual basis, and the Court's reasoning in support of its Order. These findings of fact are unchallenged here on appeal. In essence, the findings of fact showed that on August 4, 1986, Raymond A. Green, a supervisory employee at Belchertown State

School, was murdered on the school campus. Kenneth Phoenix, an employee at Belchertown State School, was charged with the murder on July 6, 1987.

Belchertown is a rural community in Hampshire County. The murder and the arrest of the defendant Phoenix, following a year of intensive investigation had been covered in numerous newspaper articles and newscasts. Interest in the events of the murder and the resultant charge against the defendant Phoenix was great in the community.

The affidavit supporting the search warrant, which was issued on July 3, 1987, is a sixteen page document with statements, descriptions and allegations gathered during the almost one year investigation of the murder. The officer who presented the affidavit to the Court gathered the information contained therein from numerous and varied sources in the usual course of the criminal investigation. The affidavit was presented as support for a request for a search warrant, which, obviously, requires a level of proof considerably less than that required of evidence presented in a criminal trial. The nature of investigatory information such as contained in the affidavit is such that it may be suppressed or deemed prejudicial in pre-trial motion proceedings.

Following these factual findings, the trial court concluded that to disseminate the investigatory information contained in the affidavit to the public as a "judicial document" on which a judge had made a decision to issue a search warrant would give an incorrect and improper status to said information. In the trial court's view: "fairness would require such dissemination to carry a complex commentary on the different standards of proof used in judicial proceedings and careful caution regarding admissibility of evidence in criminal trials. Such disclaimers would confuse the public and be impossible to monitor."

The Court recognized that an open trial with the public being informed of all aspects of the trial is a constitutionally protected right. However, the Court further concluded that this right would not be diminished by withholding, during the pendency of the trial, investigatory material which may or may not be ultimately admitted as evidence in the trial. In the Court's view: "if less than all of the information in the affidavit is admitted into evidence, the public will have access to the remainder when the case is completed."

It was central to the trial court's rationale that the right to a fair trial requires that a court protect a defendant's right to be judged by a standard of proof beyond a reasonable doubt, and that the court serve as a facilitator for information received under a lesser standard. The court ultimately concluded that the trial is the mechanism for judicial fact finding and that in light of the defendant's constitutional right to a fair trial, "justice requires impoundment of the affidavit during the pendency of this case."

In turning to a consideration of the issues raised by this record the first question, contested by the parties, is whether the search warrant and accompanying affidavit should be viewed as a "public record" as that term has come to be defined in Massachusetts law. In addressing this issue the starting point must be Mass. G.L.c. 276, Sec. 2B which provides in pertinent part.

> "Upon the return of said warrant the affidavit shall be attached to it and shall be filed therewith and it shall not be a public document until the warrant is returned."

A review of the legislative history of this statute discloses that the above language was adopted by St. 1964, c.557, Sec. 3 and has remained unchanged since its adoption. On the face of its text the statute seems to provide that once the actual search has been conducted

and the warrant returned to the Court, the warrant and supporting affidavit become public documents. In purport too, a like conclusion seems compelled. In effect, the language of the statute recognizes the public nature of the documents but protects the investigation and search by restricting public access until the search has been completed and the warrant returned to the Court. As the plaintiff argues, in this way the investigation will not be impaired until it is completed.

Moreover, the "public nature" of the affidavit and warrant does not rest entirely upon the above statute. Even without such a statute, in appropriate circumstances, the courts of this country have long recognized a generalized right to inspect and copy public records and documents, including judicial records and documents. See, e.g., *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597; 55 L.Ed.2d 570, 579 (1978); *United States* v. *Criden*, 648 F.2d 814 (3rd Cir. 1981); *United States* v. *Myers*, 635 F.2d 945 (2d Cir. 1980). Indeed, in *United States* v. *Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) rev'd. on other grounds sub nom. *Nixon* v. *Warner Communications*, *supra*, the Court of Appeals for the District of Columbia emphasized the principle that the common law right to inspect and copy judicial records is fundamental in a democracy. Other courts have suggested that the right to inspect and copy (right of access) antedates the Constitution. See, e.g., *United States* v. *Criden*, 648 F.2d at 819 (Abscam Case); *United States* v. *Mitchell*, 551 F.2d at 1260.

In *Sibley* v. *Holyoke Transcript-Telegram Publishing Co., Inc.*, 391 Mass. 468 (1984) the Supreme Judicial Court held that the issuance of a search warrant, whether by a judge or a clerk, involves the exercise of judicial discretion and constitutes a "judicial proceeding." Id. at 471. See also *Thompson* v. *Globe Newspaper Co.*, 279 Mass. 176 (1932); *Thompson* v. *Boston Publishing Co.*, 285 Mass. 344 (1934) concerning arrest warrants and

supporting affidavits; and *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.). Although *Sibley, supra*, concerned an action for libel and not access, the Court's central rationale is relevant here. The Court, in holding that a publisher had a qualified privilege to report judicial proceedings, stated:

> "This qualified privilege is justified not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself . . . as to the mode in which a public duty is discharged (citing *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884) . . . the purpose of the privilege is to ensure that publications may perform the important function of informing the public of actions taken by the Courts. *Sibley*, supra at 471-472."

As a starting point, then, it cannot be gainsaid that the affidavit is a part of the generic judicial proceeding. It is the very basis upon which the Court issued the search warrant. Accordingly, in our view, both the operative statute and relevant case law compel the conclusion that a search warrant and affidavit are "public records," to which the public and the press have historically been entitled to access, in appropriate circumstances. Obviously, whether the circumstances are "appropriate" is whether the disclosure of the contents of the affidavit would likely affect the prospects of the defendant to a fair trial. In effect, then, to conclude, as we do that the affidavit is indeed a "public record" is not to automatically conclude that impoundment of such a record is outside the sound discretion of the trial court.

In this regard, there is no doubt that, as a general proposition, impoundment is within the authority of the District Court. "It is within the discretion of a court to impound its files on a case and to deny public inspection

of them, and that is often done when justice so requires." *H.S. Gere & Sons, Inc.* v. *Frey*, 400 Mass. 326, 329 (1987). Or, as was stated in another context: "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). See also, *New Bedford Standard-Times Publishing Co.* v. *Clerk of the Third District Court of Bristol*, 377 Mass. 404, 410 (1979); *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977); Uniform Rules on Impoundment Procedure (1986).

Having determined that the affidavit is a "public record" but also having concluded that a trial court has the inherent right to exercise its discretion, in appropriate circumstances, to safeguard the prospective trial from harmful external influences, we turn, then, to an examination of the relevant precedents to determine how and in what circumstances discretion is properly exercised in this area.

Despite this nation's historical commitment to "openess" and to a generalized "right to know" actuated by First Amendment imperatives, until very recently the United States Supreme Court repeatedly rejected arguments claiming a constitutional right of access to information within governmental (including judicial) control. Then, in 1980, in the seminal case of *Richmond Newspapers, Inc.* v. *Virginia*, the Supreme Court, for the first time, recognized the public's right of access to criminal trials.[1]

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[1] Court members themselves recognized the importance of this decision. Justice Stevens stated, "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." Id. at 582 (Stevens, J., concurring).

In the *Richmond Newspapers* case, seven members of the Court agreed that there was a first amendment right to attend criminal trials.[2] However, because six of these Justices submitted separate opinions,[3] the central rationale of the Court remained unclear.

In his opinion for the Court, Chief Justice Burger relied in part on the "political" theory of the first amendment.[4] He explained that some right of access protection is needed if the first amendment is to fulfill its "core purpose" of providing information on issues related "to the functioning of government."[5] He found this to be especially true in the criminal trial context, because, in his view, no aspect of government is "of higher concern and importance to the people than the manner in which criminal trials are conducted."[6] The Chief Justice, however, did not rely solely on this political argument to justify the right of access. He also invoked what Justice Blackmun called a "veritable potpourri"[7] of constitutional guarantees, including the first amendment right of assembly,[8] the ninth amendment,[9] and the "penumbra"

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[2] Justice Rehnquist was the sole dissenter. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 604-06 (1980) (Rehnquist, J., dissenting). Justice Powell did not participate in the case.

[3] See id. at 558-81 (Burger, C.J., plurality opinion); id. at 584-98 (Brennan, J., concurring); id. at 598-601 (Stewart, J., concurring); id. at 601-04 (Blackmun, J., concurring in the judgment).

[4] See *Richmond Newspapers*, 448 U.S. at 575-77.

[5] Id. at 575.

[6] Id.

[7] Id. at 603 (Blackmun, J., concurring in the judgment)

[8] See id. at 577-78. Chief Justice Burger suggested that the trial courtroom could be considered a "public place." Id. at 578.

[9] See id. at 579 n.15.

of the Bill of Rights.[10] Underlying all of these, Chief Justice Burger said, is the "presumption of openness" of criminal trials resulting from the long historical tradition of access to such proceedings.[11]

In a concurring opinion which became the foundation for subsequent decisions in this area, Justice Brennan based the right of access to government-controlled information squarely on the political theory of the first amendment. He wrote that an informed citizenry is "necessary for a democracy to survive,[12] and that to ensure that information flows to the public, the first amendment must provide a right of access to government information.[13] Conceding that the scope of such a right is "theoretically endless," [14] Justice Brennan proposed "two helpful principles to aid in setting practical limits on access rights.[15]

First, Justice Brennan stated that a right of access claim is stronger where there is a tradition of openness

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[10] See id. at 579-80. Chief Justice Burger compared the right to attend criminal trials to such penumbral guarantees as the right of association and the right of privacy. See id.

[11] Id. at 573. Chief Justice Burger stressed the fact that a tradition of access to trials existed at English common law, and was firmly in place in this country at the time the Bill of Rights was adopted. See id. at 564-75. The Chief Justice relied on this factor to distinguish the earlier "right of access" cases.

[12] Id. at 588 (Brennan, J., concurring).

[13] See id. at 587-88.

[14] Id. at 588 (quoting Brennan, Address, 32 Rutgers L. Rev. 173, 176 (1979). Justice Brennan noted that the access right could be invoked not only to support demands for any and all sorts of government information, but to challenge virtually any government restriction on private actions, because "(t)here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." Id. (quoting Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)).

[15] Id. at 589.

to the particular proceeding or information at issue.[16] Second, he proposed that access be granted whenever it furthers the functioning or purposes of the particular process involved.[17] He then found both of these factors to be present in the context of criminal trials.[18] Justice Brennan therefore concluded that only a "compelling" government interest could outweigh the right of access to trials.[19]

The Court's next right of access case originating here in the Commonwealth, decided in 1982 was *Globe Newspaper* v. *Superior Court.*[20] In that case, the Court, in a majority opinion written by Justice Brennan struck down a Massachusetts law requiring judges to exclude the press and the public from the courtroom during the testimony of minors who were alleged victims of a sex offense.[21] Justice Brennan relied on his reasoning in *Richmond Newspapers,* stating that the right of access is grounded in the core first amendment purpose of ensuring that citizens can "effectively participate in and contribute to our republican system of self-government."[22] In the course of his opinion for the majority, Justice Brennan explicitly adverted to the "two helpful principles" he had articulated in *Richmond Newspapers.* He emphasized that the protection of a right of access implicit in the first amendment is explained and enhanced by the tradition of openness associated with the proceeding and by the role that such access could contribute to the functioning of the criminal trial process.

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[16] See id.

[17] See id.

[18] Justice Brennan, like Chief Justice Burger, noted the long tradition of access to trials.

[19] Id. at 598.

[20] 457 U.S. 596 (1982).

[21] Id. at 610-11.

[22] Id. at 604.

Although Justice Brennan's opinion indicated that the two principles, "tradition of openness" and "contribution to function," were simply "helpful" concepts, the opinion seemed to imply that the principles were the bases or the necessary preconditions for a right of access to criminal trials. Indeed, after *Globe*, some lower courts began using "tradition" and "contribution to function" as a two-pronged standard for determining whether there was a right of access to government proceedings or information.[23]

Other language in Justice Brennan's opinion, however, cast doubt on the importance of these two principles. It had been the position of the Commonwealth of Massachusetts in *Globe* that the requisite "tradition of openness" was not present in the case because criminal trials had historically been closed during the testimony of minors who were sex crime victims.[24] Justice Brennan rejected this argument, saying that access to a particular trial did not depend on the historical openness of the type of trial involved. This, together with the explicit basing of the right of access in first amendment political theory, led some courts to treat "tradition" and "contribution to function" as mere factors to be considered in evaluating right of access claims.[25] Thus, it could be argued that the standard for determining when a right of access exists was still uncertain after *Globe*.

The *Globe* decision did, however, establish the test for assessing government attempts to limit access rights

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[23] See, e.g., United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983) ("the lack of an historic tradition . . . does not bar . . . a right of access"); In re Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 54 (E.D. Mich. 1985); Herald Co. v. Board of Parole, 131 Misc. 2d 36, 45-46, 499 N.Y.S.2d 301, 308 (Sup. Ct. 1985).

[24] See Globe 457 U.S. at 605 m.13.

[25] See, e.g., Cable News Network v. American Broadcasting Cos., 518 F.Supp. 1238 (N.D. Ga. 1981).

where they do exist. Government restrictions are subject to the traditional first amendment "strict scrutiny" standard: the right of access could be outweighted only by a "compelling governmental interest" and the denial had to be "narrowly tailored to serve that interest." [26] The use of the strict scrutiny standard seemingly served to emphasize the Court's inarticulate major premise that the right of access is a first amendment right.

In *Press-Enterprise Co.* v. *Superior Court* [27] (*Press-Enterprise I*), decided two years later, the Supreme Court found a right of access to voir dire proceedings in a criminal case. This was the first time that the Court recognized a right of access to a proceeding other than a formal criminal trial. The opinion for the majority did not discuss the constitutional basis of this right of access, but instead turned directly to a discussion of the "tradition of openness" and "contribution to function" principles.[28] After finding that both of these factors were present, the Court recognized a right of access to voir dire proceedings and declared that government attempts to deny this right had to meet *Globe*'s strict scrutiny standard.[29]

The majority's reference to "tradition" and "contribution to function" seemed to provide further confirmation of the importance of these factors. Nonetheless, the opinion did not explicitly state that these two factors

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[26] Globe, 457 U.S. at 606-07. Applying this standard to the statute at issue, Justice Brennan found that the interest in protecting the wellbeing of a minor was compelling, but then found that a mandatory closure rule was too broad. See id. at 607-08.

[27] 464 U.S. 501 (1984). See id. at 504-05.

[28] This, in fact, probably prompted Justice Stevens' concurrence, in which Justice Stevens said that he wanted to "emphasize" the fact that the holding was based on the political theory of the first amendment. See id. at 516-19 (Stevens, J., concurring).

[29] Id. at 510.

were "prerequisites" to a right of access. Indeed, evidence of historical tradition was referred to merely as "helpful" to that determination. And this approach lent some support to lower court arguments that "tradition" and "contribution to function" were just two of the many factors to be weighed in evaluating a right of access claim.[30]

The uncertainty of precise rationale left by *Press-Enterprise I* was exacerbated by *Waller* v. *Georgia*.[31] In *Waller*, a unanimous Court found that a defendant's sixth amendment right to a public trial had been violated when a pretrial suppression hearing had been closed to the press and public. Although the Court did not rule on the petitioner's first amendment claim, the opinion seemed to imply that there was a right of access to suppression hearings.[32] Not only did this suggest an expansion of the right of access, it did so without discussing the "tradition of openness" factor that was so important in *Globe*

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[30] See, e.g., In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1347 (1985) (Wright, J., concurring in part and dissenting in part) ("(T)he Court appears to have weighed historical practice as one factor among many in evaluating the appropriate scope of the right of access.").

[31] 467 U.S. 39 (1984). *Waller* was decided four months after *Press Enterprise I*.

[32] Justice Powell's opinion relied on the *Richmond Newspapers* line of cases to establish that right, saying that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Id. at 46. His opinion also noted that "(t)o the extent there is an independent public interest in the Sixth Amendment public-trial guarantee(,) . . . it applies with full force to suppression hearings." Id. at 47 n.5.

Two years after *Waller*, in *Press-Enterprise Co.* v. *Superior Court* (*Press-Enterprise II*, 106 S.Ct. 2735 (1986), the Supreme Court confirmed that *Waller* recognized a first amendment right of access to suppression hearings: "(I)n *Waller* v. *Georgia* . . . . (w)e noted that the First Amendment right of access would in most instances attach to (suppression hearings)." Id. at 2740.

and *Press-Enterprise I*. Justice Powell's opinion focused instead on the importance of the public interest in such hearings. As suggested above, *Waller* thus further confused the standard for evaluating right of access claims.

In its latest "right to know" case, *Press-Enterprise Co.* v. *Superior Court*[33] (*Press-Enterprise II*), the Supreme Court seemingly announced the definitive standard for determining whether there is a right of access to government-controlled information. In this decision the Court seemingly established the following standard. The reviewing court must first decide whether the "proceeding" to which access is sought meets the "tests of experience and logic."[34] These tests are the two helpful principles that Justice Brennan first articulated in *Richmond Newspapers*. Under this formulation there must be a history and tradition of access to the proceeding,[35] and this "access" must be deemed to play a "significant positive role in the functioning of the particular process in question.[36] The Court indicated that if the proceeding at issue passes these tests, then a "qualified" first amendment right of access attaches.[37]

Once a "qualified" right of access is established, a reviewing court must then decide whether that right can be restricted.[38] To resolve this issue a court must apply the "strict scrutiny" test set out in *Globe* and *Press-*

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[33] 106 S.Ct. 2735 (1986). In *Press-Enterprise II*, the Court held that the first amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California. See id. at 2743.

[34] *Press-Enterprise II*, 106 S.Ct. at 2741. The Court borrowed this language from Justice Brennan's opinion in *Globe*. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606 (1982).

[35] *Press-Enterprise II*, 106 S.Ct. at 2740.

[36] Id. at 2740.

[37] Id. at 2741.

[38] Id. at 2741-42.

Enterprise I.[39] This means that the right of access can only be restricted if it is outweighed by an "overriding" public interest and if the denial of that access is narrowly tailored to promote that interest.

With the foregoing as a broad organic scaffolding of the conceptual framework established by United States Supreme Court precedent we turn again to the present record.

As a general principle, and as a matter of precedent and logic, it seems clear to us that the first amendment right of access to criminal trials, so carefully adumbrated by the Supreme Court in the foregoing cases, applies equally to those facets of the criminal process which in normal course, precede the *formal* criminal trial.

For example, it has been held that the first amendment right of access applies to pretrial hearings. See, *United States* v. *Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1983). Assuming that this principle has been established, there is no basis in logic to seek to distinguish between pretrial proceedings and the very documents which may generate the hearing and supply its procedural genesis and context in the teleological continuim of the criminal process.

Again, it can be well argued that the essential *raison d'etre* for a first amendment right of access to criminal proceedings has a conspicuous relevance to pretrial documents. Those justifications are: "(f)irst, the criminal trial historically has been open to the press and general public," and "(s)econd, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co.* v. *Superior Court, supra*, 102 S.Ct. 2613, 2619-20 (1982).

It is now beyond dispute that the press and public have historically had a common law right of access to most

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[39] Id. (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984).

pretrial documents, see, e.g., *Nixon* v. *Warner Communications, Inc.* 435 U.S. 589, 597-98 (1978). Moreover, it requires little imagination to recognize that certain pretrial documents, in appropriate contexts and circumstances, are frequently important to a more complete and cohesive understanding of the way in which "the judicial process and the government as a whole" are functioning. In sum, logic, precedent and experience reinforce the conclusion that the public and press have a first amendment right of access to pretrial documents—including, documents such as the focus of this case—an affidavit grounding a search warrant.

It is equally clear that, a. on the present record, where it is asserted that the first amendment's putative right of access conflicts with a defendant's sixth amendment right to a fair trial, that the party seeking the sealing of documents establish that the procedure "is strictly and inescapably necessary in order to protect the fair-trial guarantee." *Brooklier, supra* at 1167 (quoting Gannet Co. v. DePasquale, 443 U.S. 368 (1979) (Blackmun, J. concurring). In effect, this means that there must be a substantial probability that irreparable damage to a defendant's fair-trial right will result if the document at issue is not sealed. In this context, as in all other facets of the criminal justice process, we must be scrupulous less we reverse, overtly or tacitly, that "presumption of openness" which must characterize criminal proceedings "under our system of justice," *Richmond Newspapers, Inc.* v. *Virginia, supra* at 573 (plurality opinion). See also, *Globe Newspaper Co., supra* at 2633.[40]

Having recognized and validated the "presumption of openness" that must characterize criminal proceedings, it remains to be said that the protection of the defendant's right to a fair trial is undeniably a governmental interest

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[40] Although it is clear that certain documents, such as transcripts of grand jury proceedings, historically have been beyond the ambit of considerations of first amendment access.

sufficient to warrant impoundment as a general proposition. As the United States Supreme Court has stated: "No right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co.* v. *Superior Court, supra* at 508 (1984).

In *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), the Supreme Court emphasized the importance of the defendant's right to a fair trial in the context of a media claim of access:

> This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. (Citations omitted). To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pre-trial publicity. (Citation omitted). And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.
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> Publicity concerning pre-trial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. (Citation omitted). Publicity concerning the proceedings at the pre-trial hearing, however, could influence public opinion against the defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.
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> . . . Closure of pre-trial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun.

443 U.S. at 378-79. These observations apply with equal force to search warrant affidavits in a case, such as this one, which is highly publicized in a community of rural cast and context, where, according to the findings of the trial judge "(I)nterest in the events of the murder and the resultant charge against the defendant Phoenix was *great.*" (emphasis supplied).

Perhaps the situation would be different if we were dealing with a large, extended "megatropolis." See, e.g., *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 565, where the United States Supreme Court took account of the broad geographic and demographic venue of the arena in which the putative prejudicial publicity might arise as a sufficiently insulating and deflecting condition. There the court stated: "in a large metropolitan area such as Los Angeles, with its millions of potential jurors, it is unlikely that 'searching questions of prospective jurors x x x' and 'the use of emphatic and clear instructions' will fail to produce an unbiased jury, regardless of the nature of the pretrial documents filed." In short, what might pass muster in the sweep and scope of a Los Angeles clearly would, as the trial judge found here, generate unsettled doubts and grave concerns that violence might be done to basic concepts of fair trial in the more languid, bucolic, inner leaning venues, of rural Belchertown.

Here we are satisfied that an extremely conscientious trial judge was justified in concluding that there was a substantial threat to the defendant's fair trial rights—a conscientious trial judge who sought to reach for and accommodate the fair balance between the sometimes conflicting interests which arise in the course of assuring a fair and public trial. Where the threat to the defendant's fair trial right is established—as we conclude that it was here—the trial judge was well within her authority to conclude that justice did require the impoundment of the affidavit pending trial.

Our review of the record persuades us that the trial judge was justified in concluding that there was at least the danger of intense and pervasive pretrial publicity concerning this case if the contents of the affidavit were released in advance of trial. Accordingly, she could also reasonably conclude, based on common human experience, that this adverse notoriety might well impair the defendant's right to a fair trial. She did not purport to say more, for, in effect, she found a "clear and present danger that pretrial publicity might impinge upon the defendant's right to a fair trial. See *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 562-563. What emerges clearly from the detail findings of the trial judge is that her review of the contents of the affidavit convinced her that broad and unguided dissemination of its contents, in advance of trial, might indeed create a risk that pretrial news accounts based on the contents of the affidavit, true or false, would have some adverse impact on the attitudes of those who might be called as jurors.

In this regard, the words of *Gannett Co.* v. *DePasquale*, *supra*, have a telling relevance:

> At the same time, I do not deny that the publication of information learned in an open proceeding may harm irreparably, under certain circumstance, the ability of a defendant to obtain a fair trial. This is especially true in the context of a pre-trial hearing, where disclosure of information, determined to be inadmissible at trial, may severely affect a defendants' rights. Although the Sixth Amendment's public-trial provision establishes a strong presumpton in favor of open proceedings, it does not require that all proceedings be held in open court when to do so would deprive a defendant of a fair trial. 443 U.S. at 439.

We fully recognize and validate the importance and centrality of the constitutional guarantee of freedom of the press, not merely as an aid to the media in its

varied shapes and forms, but, more fundamentally, as a benefit for all the people. We fully appreciate that a broadly defined freedom of the press assures the maintenance of our political system of democracy, social equality, and public exposure. Indeed, it can well be argued, as *Camus* has recognized, that the unique strength of America, different from any nation in the world, resides in its openness.[41] All of that having been said, it is clear that the right of public access to the judicial process ends only where the defendant's right to trial by an impartial jury is unalterably threatened. In sum, "(A)lthough the right of access to criminal trials is of constitutional stature, *it is not absolute.*" *Globe Newspaper Co.* v. *Superior Court*, 102 S.Ct. 2613, 2620 n. 17. It seems to us that the *Globe* court made it crystal clear that neither the First Amendment nor the Sixth gives either the press, the public (or a defendant) the right to pre-empt or superimpose their views on the traditional discretion of a trial judge to assess the quotient of putative prejudicial publicity inherent in any document or other matter and the inevitable resultant radiations and ramifications on the judicial process.

Our review of the cases in this area makes clear that the right of "fair trial" is companion, not servant, to the constitutional guarantee of public trial. A defendant's individual stake in it is to be protected and, at least, accorded as much deference as that of other elements of society. And, just as clearly, a trial judge, in appropriate circumstances, has a duty to extend and vindicate that protection to the full extent of its discretion. A trial judge surely must reinforce the important rights of public and press under the First Amendment. But the

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[41] Camus, the celebrated French writer whose works express a courageous humanism, saw it this way:

> A free press can of course be good or bad, but most certainly, without freedom it will never be anything but bad x x x
> Freedom (for the press) is nothing else than a chance to be better, whereas enslavement is a certainty of the worse.

judge, where the circumstances warrant, cannot be seen as disregarding the dangers of adverse publicity on the premise—tacit or overt—that adverse pretrial publicity really is not of much consequence—a conclusion antithetical to the real life lessons of criminal trials or the actual experience of trial lawyers.

In short, in this area, as in so many other aspects of the administration of justice, drawing the least restrictive line is an essential function of the judicial process. In this case we believe that a conscientious trial judge has exercised her discretion to draw that line faithful to the requisite constitutional balancing and in her detailed finding has underscored, found and articulated the reasons for her judgment. In sum, we believe that in a valid exercise of discretion, she has achieved a fair balance of the sometimes conflicting interests which arise in the course of assuring a "fair" as well as "public" trial.

Accordingly, we believe that the Report should be dismissed. An Order will enter in accordance with the Opinion.

/s/ Frank J. Larkin
LARKIN, J.

/s/ Allan McGuane
McGUANE, J.

/s/ Bernard Lenhoff
LENHOFF, J.

This certifies that this is
the Opinion of the Appellate
Division in this cause.

/s/ Evelyn R. Donohue
Clerk

Lenhoff, J. (Dissenting)

The proceedings before this Appellate Division, though civil by general rule set forth in *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. Sec. 39,551 (1977), the report submitted deserved no consideration due to lack of jurisdiction. Noted at page 551 of *Ottaway Newspapers, Inc.* v. *Appeals Court, supra*, is the following language: "The action will end in a judgment capable of appeal under ordinary rules."

In dissenting, an appeal "under ordinary rules" is differentiated from a report to the Appellate Division as per Dist./Mun. R. of Civ., Rule 64.

Prior to the enactment of G.L. C. 231, Sec. 103, District Court decisions were appealed to the Superior Court where a trial de novo was obtained. Said statute provides that an election to commence an action in the District Court instead of the Superior Court, where it also could have been instituted, results in the waiving of a jury trial together with the right to appeal to the Superior Court. *Third National Bank of Hampden County* v. *Continental Ins. Co.*, 388 Mass. 240, 242 (1983). *Locke* v. *Slater* 387 Mass. 682, 684 (1982).

The Appellate Division was created by G.L. C. 231, Sec. 108 and it enables litigants to report cases to this body for review of questions of law arising at trial where the right of appeal to the Superior Court has been waived. In addition thereto, this Division has been given jurisdiction by specific statutory enactment. For example, the Appellate Division has been legislatively designated to review District Court decisions in (1) cases brought pursuant to the Uniform Reciprocal Enforcement Support Act (St. 1954, C. 556, Sec. 9); (2) matters relative to claims for compensation of victims of violent crimes (St. 1967, C. 852, Sec. 2 amending G.L. C. 231, Sec. 108; (3) appeals on questions of law relating to civil motor vehicle infractions (G.L. C. 90; Sec. 3);

and, (4) in small claims cases if questions of law, in the form of a case stated, is submitted by the Trial Court. (G.L. C. 218, Sec. 23).

As stated previously herein, the judgment here involved "is capable of appeal under ordinary rules." Hence, an appeal to the Superior Court as per G.L. C.231, Sec. 97 would be the correct and proper avenue to pursue *providing* the case is a "civil action" within the meaning thereof. *Gentile* v. *Rent Control Board of Somerville*, 365 Mass. 343, 346 (1974). *Freeman* v. *Rent Control Administrator of Cambridge*, 1 Mass. App. Ct. 800 (1973). However, the "civil action" created in *Ottaway Newspapers, Inc.* v. *Appeals Court, supra*, to deal with the impoundment of court papers differs in a marked manner from the term "civil action" employed in said G.L. C.231, Sec. 97 which ordinarily applies to actions of law. See *Hatfield* v. *Klimoski*, 338 Mass. 81, 83, (1958). The instant "civil action" involves both certiorari and mandamus considerations. The appeal seeks correction of a judicial tribunal's action plus the remedy which involves the release of the impounded papers by the Clerk/Magistrate record keeper who is a named party herein. Further, because these proceedings are extraordinary in character and no jury trial is involved as would be the case if a trial de novo on the merits were available in the Superior Court, the appeal is to either the Supreme Judicial Court or Appeals Court "under ordinary rules."

To further fortify the foregoing stated appeal procedure, attention is directed to the recently amended Chapter One of the Rules of the Supreme Judicial Court adopting new Rule 1.15 thereof. Same relates to impoundment procedure, effective January 1, 1988. Additionally, Trial Court Rule VIII was also amended by adding a new Rule 12 thereto pertaining to review of impoundment orders. Said Rule 12 establishes review by a single justice of an Appellate Court. Consequently, Trial Court Rule

VIII, effective September 1, 1986 as amended on January 1, 1988 as above, all relating to impoundment in civil proceedings, leaves no doubt that review is not in this Appellate Division.

Possessing no jurisdiction to review an order of impoundment the report be and is hereby dismissed.

/s/ Bernard Lenhoff
LENHOFF, J.

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT
OF THE TRIAL COURT

HAMPSHIRE, SS. WARE DIVISION

Civil Action No.: 87-161

NEWSPAPERS OF NEW ENGLAND, INC.,
Plaintiff

vs.

JAMES H. BLOOM, Clerk/Magistrate of the Hampshire District Court, WARE DIVISION; W. MICHAEL RYAN, District Attorney, Northwestern District; and KENNETH PHOENIX,
Defendants

SUMMARY OF FACTS

On July 3, 1987, Kenneth Phoenix of Belchertown, Massachusetts, was arrested for the August 4, 1986, murder of Raymond Green. He was arraigned in this Court on July 6, 1987—(Case No. 8746CR0385). A search warrant issued by Superior Court Judge John Murphy was returned to this Court on July 9, 1987. Kenneth Phoenix was indicted by the Grand Jury and arraigned in Hampshire Superior Court on July 24, 1987. On the same day, this case was dismissed in this Court.

On July 10, 1987, a reporter for the Holyoke Transcript-Telegram, a newspaper circulated in an area including Belchertown, requested access to the search warrant and to the affidavit on which it was based. The reporter was given access to the search warrant but not to the affidavit. At the request of the newspaper, an immediate hearing in open Court was held at which an

Attorney for the newspaper requested access to the affidavit as a public record. After the hearing, I found that the affidavit was not a public record, and the newspaper had no legal right of access to it. I found that even if the newspaper had a legal right of access, I could limit such right as the public's right to know must be balanced against the Defendant Phoenix's right to a fair trial in a pending case. After reviewing the 16-page affidavit, I ordered it impounded to prevent dissemination of possible suppressible prejudicial material to the public without the protection of the trial mechanism in the event that there was a legal right of access. Neither the Commonwealth not the Defense had filed a Motion to Impound.

On July 14, 1987, the Plaintiff, publisher of the aforementioned newspaper, filed this action. A hearing was held on July 21, 1987. The Commonwealth was not present, although the District Attorney filed an Answer and a Motion to Dismiss. The Defendant Phoenix's attorney was present and opposed the Plaintiff's request that the Order of Impoundment be vacated and the Plaintiff be given access to the Affidavit. Arguments were heard and memorandums were filed by July 28, 1987

ISSUES RAISED

I. Is this the appropriate procedure to be followed?

II. Is the affidavit on which a search warrant is based a public document? Does a newspaper have a legal right of access to such an affidavit?

III. If a newspaper does have a right of access to the affidavit, is an Order of Impoundment proper under the circumstances of the case?

DECISION

I. Procedure

It appears that the Plaintiff has properly followed the procedure recommended in *Ottawa Newspaper, Inc. v. Appeals Court* 372 Mass 539.

II. Public Document and Right of Access

a) Public Document

The affidavit on which the search warrant was based is not a public record. Massachusetts General Laws, Chapter 276, Section 2B provides that the warrant becomes a public record after it is returned to the Court. I do not agree with the Plaintiff's interpretation of this statute, i.e. once the warrant is returned to the Court, the warrant and supporting affidavit become public documents. No Massachusetts case has been cited which has ever so ruled. Such an affidavit has not been found to be a public record in Massachusetts.

b) Right of Access

The Plaintiff does not have a present legal right of access to the affidavit filed in support of the issuance of a search warrant. The press and the general public's right of access to criminal trials is embodied in the First Amendment of the Constitution and applied to the states through the Fourteenth Amendment as set forth in *Richmond Newspapers, Inc. v. Virginia* 448 US 555, 65 L. Ed. 2d 973; *Globe Newspaper Company vs. Superior Court* 457 US 596; 73 L. Ed. 2d 248, and *Press-Enterprise Company v. Superior Court* 464 US 501, 78 L. Ed. 2d 629. Such right of access to criminal trials is based on the following factors:—

1) The criminal trial historically has been open to the press and general public. Thus the presumption of openness is solidly grounded in tradition.

2) Public scrutiny enhances the quality and safeguards the integrity of the trial with benefits to both the Defendant and to society as a whole. It fosters an appearance of fairness and hence respect for the judicial process. Public access to criminal trials permits the public to serve as a check upon the judicial process.

These cases carry no implications outside the context of criminal trials as was pointed out by Justice O'Connor in her concurring opinion in the *Globe* case.

This affidavit is not part of a criminal trial. Rather, it is a pre-arrest document of 16 pages containing descriptions, statements, and allegations compiled by law enforcement officials in the investigation of this murder. Historically, such investigatory materials are not disclosed to the public before the trial. Such disclosures have been deemed not to be in the public interest. Disclosure of such pre-arrest investigatory materials without the procedural protection present in a trial would undermine the integrity of the trial. The dissemination of such materials as a judicial document would give such investigatory materials an apparent judicial acceptance and approval when in fact the materials may be suppressible and prejudicial. This would foster the appearance of unfairness and hence produce a lack of respect for the judicial process. The public's right of access to a criminal trial does not include the right to discover pre-arrest investigatory materials presented to the Court in an affidavit supporting a request for a search warrant. If a warrant does issue, a newspaper does have the right of access to that warrant upon its return to Court. In a pending case, a newspaper does not have a present legal right of access to the affidavit.

III. Order of Impoundment

If such affidavits were found to be public records or the Plaintiff is found to have a present legal right of access to such an affidavit, the right of access would not

be absolute. Both Federal and Massachusetts cases clearly state that access is subject to restraint dictated by the nature of the information and countervailing interests. In this case, the Court must balance the public's right to know the information in the affidavit with the Defendant Phoenix's right to a fair trial. No right is greater than the right to a fair trial. In reviewing the nature of the information sought and balancing the rights of the public's access with the right of a fair trial, I order the affidavit impounded during the pendency of the murder case. In support of such order, I find:—

1) Raymond A. Green, a supervisory employee at Belchertown State School, was murdered during working hours on August 4, 1986, on the campus of the school.

2) Defendant, Kenneth Phoenix, an employee at Belchertown State School, was charged with the murder on July 6, 1987.

3) Belchertown is a rural community in Hampshire County. The murder and the arrest of the Defendant Phoenix after almost a year of investigation have been covered in numerous newspaper articles and newscasts. Interest in the events of the murder and the subsequent charge against Defendant Phoenix is great in the community.

4) The affidavit is a 16-page document with statements, descriptions and allegations gathered during the almost one year investigation of the murder.

5) The officer who presented the affidavit to the Court gathered the information contained therein from numerous and varied sources in the usual investigatory procedure.

6) The affidavit was presented as support for a request for a search warrant which requires a level of proof much less than that required of evidence presented in a criminal trial.

7) The nature of investigatory information such as contained in the affidavit is such that it may be suppressed or deemed prejudicial in pre-trial motion proceedings.

8) To disseminate the investigatory information in the affidavit to the public as a judicial document on which a Judge had made a decision to issue a search warrant would give an incorrect and improper status to said information. Fairness would require such dissemination to carry a complex commentary on the different standards of proof used in judicial proceedings and careful caution regarding admissability of evidence in criminal trials. Such disclaimers would confuse the public and be impossible to monitor.

9) An open trial with the public being informed of all aspects of the trial is a constitutionally protected right. That right is not diminished by withholding during the pendency of the trial, investigatory materials which may or may not be admitted as evidence in the trial. If all of the information in the affidavit is admitted into evidence during the trial, the Plaintiff will have immediate access at that time. If only some of the information in the affidavit is admitted into evidence, the public will have access to the remainder when the case is completed.

10) The right to a fair trial requires that the Court protect the Defendant Phoenix's right to be judged by a standard of proof beyond a reasonable doubt and not serve as a conduit for information received under a lesser standard. The trial is the mechanism for judicial fact finding and not pre-trial or pre-arrest hearings.

Therefore considering the nature of the information in the affidavit, the limited purpose for which said information was presented to the Court, and balancing the rights of the Plaintiff and the Defendant Phoenix, and after

considering corrective alternatives in securing a fair trial, I find that justice requires impoundment of the affidavit during the pendency of this case.

August 10, 1987.

/s/ Ann M. Gibbons
ANN M. GIBBONS
Justice

AFFIDAVIT

1. My name is Kevin M. Murphy. I am a State Police Officer currently assigned to the Crime Prevention and Control unit of the Massachusetts State Police assigned to the District Attorneys Office in Northampton, Massachusetts. I have been a State Police Officer since 4-29-72, and assigned to the CPAC unit for approximately five (5) years. During the preceding five (5) years, I have attended a homicide seminar, for forty (40) hours, at the University of Delaware; and the Federal Bureau of Investigation National Academy, for a three (3) month course in advanced investigation and management of major crimes. I have participated in the investigation of fifteen (15) to twenty (20) homicides committed in Hampshire and Franklin counties. I am a Deputy United States Marshal, and within the preceding two (2) years, participated in a federal investigation, leading to the arrest of six (6) persons who were subsequently charged with murdering a New Jersey State Police officer and numerous bombings and bank robberies throughout the northeastern United States.

2. On August 4, 1986 at approximately 1301 hours, the body of a murder victim was discovered by the victim's secretary in his office at the Belchertown State School, Belchertown, Massachusetts. The victim, Raymond Green, was last seen alive at approximately 1245 hours as he entered the power house of the State School with a lunch bag in his hand to return to his office. He was seen at that time by several employees working in the vicinity of the power plant. The victim stopped and had conversation with those employees. Together with other State Police officers, I arrived at the Belchertown State School at 1320 on that date. The crime scene is described as follows. The murder took place in a facility called the power house. The building is a two story brick, factory type, facility with three boilers located in the lower floor and three turbines on the second floor.

The building is built into a hill and therefore therefore one can exit at ground level from either the first or second floor. Adjacent to the turbine area on the second floor of the power house is a hall that leads to an office. The entry to this office is directly opposite a door leading outside. As you enter this office there are three office desks. Two are assigned to secretaries and the other desk is assigned to the plant engineer. There is an inner office which was assigned to the victim. The crime took place in both these offices.

3. Upon entering the outer office there is an empty 22 caliber casing on the floor in the center of the door jamb. The door is open and there is another empty casing under the open door. Standing in the doorway facing into the office you see a desk on the right, (engineers desk) there is another empty casing under the desk. Just left of the door jamb is a lunch bag containing a lunch, a meatball grinder and a diet soda. Again standing in the doorway facing in, to the left up near the ceiling line and three feet from the front wall is a bullet. The bullet is lodged in the paneling of the wall.

4. Just before you enter the inner office there is a coat rack to the left. There is a blood spot on the floor just in front of the rack. As you enter the inner office the door is opened and there is a hole in the bottom of the door caused by a doorstop being forced through the door. There are several blood stains with a splash pattern indicating the blood was traveling from the outer office in. The victim is lying on the floor to the left of the jamb with his feet being innermost in the office and his head within a foot of the door jamb. He is lying on his left side. There is a large pool of blood and spinal fluid about the victim's head. The victim has four bullet wounds to the head and one bullet wound to the right forearm. The wounds are as follows: below the right eye, in the center of the rear lower skull, behind the right ear are two wounds of the contact variety (a con-

tact wound is one showing searing around the entry hole, and no evidence of gunpowder stippling around the wound.) Inside the bullet wound under the right eye is green scrub material. All wounds are above the center of gravity of the victim as found in a lying position and it appears that the blood and spinal fluid was aspirated out rather than seeped out through the wounds. The wound in the right arm enters in the under side of the forearm; this could indicate a defensive wound. There were three additional spent casings recovered around the body. One was located on the floor behind the body and two others were located on the floor in front of the body.

5. My investigation revealed the following: that the victim was Raymond A. Green, a black male, born 12/27/55. Mr. Green had been the Plant Facility Manager since his appointment April 1, 1986. He was the immediate supervisor to the power house and maintenance facility at Belchertown State School, and there were sixty-four (64) employees under his supervision, all white. My investigation further revealed that during his tenure as Plant Facility Manager, Mr. Green had instituted a variety of work assignment and policy changes, directed toward more efficiently utilizing the employees under his supervision, and requiring greater accountability than had been the practice prior to his arrival. Those changes were not popular among the employees, and resulted in widespread bad feeling, freely admitted to me. Most of the 64 employees supervised by the victim and interviewed by the police after the homicide stated that he was unpopular as a supervisor. On August 4, 1986, Mr. Green had conducted two (2) disciplinary hearings before his death.

6. There was other evidence recovered at the scene. In the room where the body was found was a second pair of sunglasses that, according to the victim's secretary, did not belong to the victim. These glasses are "Foster Grant", plastic lens, color dark gray. Attached to the

glasses were four fibers on the left bow. The fibers were not human hair and are consistent with jute or sisal. The fibers are straight and all four are joined at the base. They are approximately one inch long. The victim's sunglasses were recovered from the floor near the body. These glasses were broken by the impact of the bullet. There are several pieces of a green scrub pad on the floor in both offices. This material is available in most buildings at the State School. Attached to a small piece of this scrub material was a piece of masking tape.

7. Late in the evening of August 4, 1986 a brown paper bag was located in the lower portion of the power house. The bag was located in a barrel in a storage room adjacent to the main boiler room and next to the tunnel entrance. Also recovered with the bag was a piece of green scrub material. The green scrub material was found in a rolled condition and dark stains were present on one end. The paper bag is of the type and weight that would commonly be used to hold a six-pack. It was found that the bag is readily available at several area merchants. It is not available on the campus of the State School. The bag was crumpled into a cone shape and had blood stains and dark stains similar to those on the green scrub material. It should be noted that from the power house there is a tunnel system that connects all buildings on the campus. The tunnel system is utilized to carry steam heat, telephone, electricity, and hot water from the power station to all the buildings on campus requiring those services, and at all points is large enough that a person can walk through with little difficulty. The tunnel can be accessed from any of the buildings and from most buildings a key is not necessary to enter the tunnel.

8. The above material was transported to the State Police Crime Laboratory in Boston, Massachusetts. Tests were performed on the paper bag and the green scrub material. It was found that human blood, type O, was

present on the bag. This blood type is the same as the blood type of the victim. It was also found that lead and gunshot residue were present on the bag. One small hole was detected in the bag; the perimeter of the hole contain lead residue. Further examination of the bag revealed the presence of green fibers. These fibers are similar to the fibers that compose the green scrub material. The green scrub material was also tested and lead and gunshot residue evidence was also present on this material. Based upon the above evidence and this officer's training and experience it is my opinion that the green scrub material was wrapped around the barrel of a firearm. The firearm was fired through the paper bag for at least one shot and the blood on the bag is that of the victim.

9. The bag was preserved and taken to the State Police Photography and Fingerprint section in Boston. The bag was treated with a solution to bring any latent print evidence into a visible mode. As a result of the treatment of the bag several latent prints were developed. There was also a latent print in blood that was photographed before chemical treatment of the bag.

10. In an attempt to identify the latent fingerprints on the bag I asked many employees of the Belchertown State School to voluntarily submit to having their fingerprints and palm prints taken.

11. All the fingerprints and palm prints taken in this case were taken to the State Police Photography and Fingerprint section in Boston, Massachusetts. Tpr. Brian O'Hara was assigned the case. Tpr. O'Hara has been a State Police officer for nine (9) years and assigned to the photography and fingerprint section in Boston for seven (7) years. He has attended a ten (10) week course in fingerprint identification at the State Police Academy, and a two (2) week advanced crime scene search program at the same facility. He has also at-

tended a one (1) week course in advanced latent fingerprint identification at the FBI Academy in Quantico, Virginia. He has been qualified as an expert in fingerprint identification, and has offered expert testimony in the Superior Courts of Essex, Suffolk, Norfolk and Plymouth counties.

12. The ballistic evidence that was recovered was submitted to the State Police Ballistics Lab in Boston to Lt. William Duke, a member of the Massachusetts State Police for 19 years. Lt. Duke has specialized in ballistics since 1972. He was trained by Chester Hallice, Carl Majeski and James McGuinness. He has taught a course of firearms identification at Worcester State College. He has testified as a ballistics and firearms expert in every Superior Court in the Commonwealth of Massachusetts except Dukes County as well as in courts in Virginia, Rhode Island and Connecticut. He has also testified as an expert in the Federal District Court of Massachusetts and of Connecticut. From the bullets and casings examined it was determined that the weapon used was a .22 caliber semi-automatic with a land-and-groove pattern of 6 right hand twist. The ammunition was manufactured by Dominion which is an old Canadian manufactured brand. According to the ballistics people this ammunition has not been sold in this country in over ten years.

13. On 3-16-87 Tpr. Brian O'Hara called from State Police Boston and advised that they had made an identification of a latent print on the bag. He stated that there are 14 points of identification. Trooper O'Hara told me that the number of points needed for positive identification is 8. The fingerprint was identified by Trooper O'Hara as that of Kenneth P. Phoenix, DOB 3-21-58. Tpr. O'Hara stated that they would compare the prints of Mr. Phoenix against the bloody print from the bag. There was also a strong possibility that the palm print on the bag belonged to Mr. Phoenix.

14. On 3-23-87 Tpr. O'Hara again contacted me and stated that he compared 64 (sixty four) fingerprint cards against the bloody print. The condition of the bloody print is such that it can be used by the Massachusetts State Police lab to exclude subjects but there are not enough points for that lab to make a positive identification. Tpr O'Hara stated that he had excluded 62 (sixty two) of the 64 (sixty four) suspect cards. One of the subjects not excluded was Kenneth P. Phoenix.

15. An extensive background investigation of Kenneth P. Phoenix showed that he is an employee of the Belchertown State School who works at a water treatment facility which is located off the campus. He worked at the water treatment station on the date of the homicide. He regularly works alone and comes to the power house daily to check in, have lunch, or deliver items that may be picked up for use on the campus. He is left handed and does not wear corrective lenses. According to his employment records, the Belchertown street directory, and the New England Telephone directory, he resides at 480 North Washington St. in Belchertown, Massachusetts.

16. Phoenix has been employed at the State School since 1977 and has only been formally warned for misuse of sick leave. This warning was not made by the victim in this case. On the day of 8-04-86 two memos were written by the victim that contained this subject's name. The first added to the job description of Phoenix. It stated that in addition to his duties at the water pumping station he would be responsible for identifying the location of all fire extinguishers and emergency shut-off valves throughout the entire facility. The second memo was directed to Henry Boston, plant engineer, and it stated in part that in the future no one would be picking up needed merchandise off campus grounds. It mentioned only Phoenix by name.

17. On 3-18-87 I made a request of the Firearms Records section of the State Police to identify any weapons that were registered to Kenneth P. Phoenix or anyone in his family. The request returned that this subject owned 4 (four) .22 caliber semi-automatic pistols, all registered to him prior to January 1, 1983. The Bureau of Firearms Identification also informed me that Phoenix has been issued a permit to carry pistols. He also owned several other firearms of different caliber. The record showed that he made voluntary registration of two firearms and the other guns listed to him were purchased by legal means. His firearms record also showed that he sold a weapon and went through the legal paperwork to record that sale. There is no indication that these weapons are housed at any location other than his home in Belchertown.

18. A check with Lt. Duke at the State Police Ballistics Laboratory indicated that the .22 caliber weapons owned by Phoenix could have the same land-and-groove configuration as the weapon used to kill the victim, Mr. Green. From my 15 years experience as a Mass. State Trooper and from my conversations with Lt. Duke, I know that land and groove configurations refer to the number of spirals present in the barrel of a firearm. The spirals cause the bullet to rotate in a particular direction. The number of grooves and the direction of the twist (spiral) signify various makes and manufacturers. Land and groove configurations are created by the manufacturing process.

19. The house to be searched is located at 480 North Washington Street in the Town of Belchertown. It is as a single family wood dwelling, color yellow, with the number 480 affixed to a post attached to the house near the front door. There is a mailbox in front of the home with the name Phoenix and the number 480 on the mailbox.

20. According to Mr. Phoenix whom I interviewed, he arrived at the power house at about 1145 hours on the day of the shooting. Mr. Phoenix told me that he left the lunch room at the power house at about 1210 hours and other employees who were in the lunch room at that time agreed that they last saw him that day at that time. He was not seen again that day by any of the other employees interviewed. According to Mr. Phoenix's State Employee attendance calendar, Phoenix worked the rest of the day of the shooting.

21. On 4/3/87, Staff Sergeant Robert C. Gosselin and I interviewed Kenneth P. Phoenix at the Belchertown State School Security Office. S/Sgt. Gosselin advised Mr. Phoenix of his rights per Miranda and Mr. Phoenix indicated that he understood those rights and would speak with us without an attorney. Mr. Phoenix was asked to account for his whereabouts on 8/4/86, the day of the homicide. Mr. Phoenix told us that he left the Power House at 12:10 p.m. on 8/4/86 and did not return to the Power House that day. He stated that he spent the afternoon at the pumping station and left there about 3:30. He then went home, took a shower, a reported to his part-time job at the Belchertown Pharmacy at 5:00 p.m. Mr. Phoenix was advised that a latent fingerprint had been identified on a paper bag found in the storage room in the lower level of the Power House. He was advised that the bag contained blood evidence, firearm residue, and that one fingerprint on the bag had been identified by Trooper O'Hara as being that of Mr. Phoenix. Mr. Phoenix was unable to supply an explanation regarding the presence of his fingerprint on the bag. He said he had no idea how it got there. He denied taking his lunch to work and said he had left at 12:10 p.m. to go out to lunch on 8/4/86. Mr. Phoenix was told that the bag was of the type used to carry a soda or a six-pack and he was asked when the last time was that he had brought such a bag or a bagged lunch to work.

He could not remember the last time he had brought his lunch. He denied ever bringing any soda or beverage in a bag to work.

22. On 4/3/87, Mr. Phoenix was asked if he would consent to a search for firearms at his home located at 480 North Washington Street in Belchertown. He agreed to consent to such a search and signed a formal consent which was then witnessed by myself and S/Sgt. Gosselin. We invited Mr. Phoenix to accompany us in unmarked cruiser 1148 to his home. He agreed. During the short drive, Mr. Phoenix asked the officers what kind of a problem he had regarding insurance fraud. I asked him whether he was talking about the guns he had reported stolen from his Jackson Street home on 5/24/83. Mr. Phoenix acknowledged that that was what he was referring to. He told us that the weapons were located at his Washington Street home. He said he had been hard up for money at the time and had put in the claim to receive money from Prudential Insurance. He stated he had received about $1,400 as a result of his claim. He further stated that the Smith & Wesson model 41 .22 caliber automatic which was in his home on Washington Street was hidden under the floorboards of the attic and that he would show us the location.

23. We arrived at 480 Washington Street at about 4:00 p.m. Mr. Phoenix explained to his wife that he was voluntarily turning his weapons over to us. Corporal John Delmolino and Trooper David Kenney arrived at the home and assisted us in the consent search. The search was restricted to areas to which we were led by the Mr. Phoenix. Three weapons were recoverd from a room on the first floor of the home which was identified by Mr. Phoenix as his bedroom. He then took me to the attic of the home and pointed to a floor board near a window on the south side of the home, stating that the .22 caliber automatic would be found about 2 feet into the insulation under the floorboard in front of the win-

dow. I reached into the area to which he had pointed and recovered a Smith & Wesson .22 bearing serial number A714818. All weapons seized were marked and the search was concluded at about 5:00 p.m. Four of the guns seized had been reported stolen by Mr. Phoenix to his insurer and they were placed for safekeeping in the evidence vault at the C.P.A.C. office in Northampton. None of these weapons were .22 caliber firearms except for a Marlin model 782 .22 magnum bolt action rifle. The latter was not sent to Boston for analysis because the shell size is not consistent with the crime scene evidence. The Smith & Wesson model 41 was transported to the State Police Ballistics Lab in Boston for comparison against crime scene evidence in this homicide. Two of the guns reported stolen which were not recovered were accounted for by Mr. Phoenix. Captain William Duke subsequently advised us that the submitted weapon did not match the crime scene evidence.

24. On 6/24/87, I picked up all of the fingerprint evidence from Trooper O'Hara in Boston and transported it to the C.P.A.C. office in Northampton where it was secured in the evidence vault. On 6/25/87, the evidence was sent via registered mail (#P 407 904 206) to the F.B.I. Latent Print Laboratory in Washington, D.C. for photo enhancement and possible identification of the yet unidentified bloody print. Particularly, I sent photographs and negatives of the bloody fingerprint together with fingerprint cards with known exemplars.

25. On 7/1/87, I received a telephone call from Jerry Shiflett of the F.B.I. Latent Fingerprint Laboratory and he stated that a positive identification had been made matching the bloody print to the fingerprint exemplar for finger #7 of Kenneth P. Phoenix.

26. That the discarded bag was at the scene of the homicide is apparent from the presence of the green material, masking tape, blood matching the victim's type, and gun powder residue. The two identified fingerprints

on the bag prove that Mr. Phoenix, contrary to his claim, had contact with the bag and the fingerprint in blood shows his presence at the scene of the homicide. This evidence directly contradicts his claim that he left the Power House for the last time on the day of the homicide at 12:10 p.m. since the victim was last seen alive at about 12:35 p.m.

27. It is believed that Mr. Phoenix's consent to a search of his home on April 3, 1987, and his cooperation in directing the officers to and turning over weapons which he may have believed the officers knew he possessed, was an attempt to forestall a more thorough and independent search of Mr. Phoenix's home and other depositories for the murder weapon, ammunition, and papers of transfer, purchase or ownership for that weapon.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS THIRD DAY OF JULY, 1987.

/s/ Kevin M. Murphy
KEVIN M. MURPHY

Supreme Court, U.S.
FILED
APR 20
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1514.

In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

NEWSPAPERS OF NEW ENGLAND, INC.,
PETITIONER,

v.

CLERK-MAGISTRATE OF THE WARE DIVISION
OF THE DISTRICT COURT DEPARTMENT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Respondent's Brief in Opposition.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

25 pp

QUESTION PRESENTED

Does the constitutional right of the press and the public to attend criminal trials encompass a newspaper's request for pre-trial access to a search warrant affidavit in a highly publicized murder case, where the court otherwise had the discretionary authority to temporarily impound the affidavit in furtherance of the constitutional right of the accused to a fair trial?

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No. 88-1514

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1988

NEWSPAPERS OF NEW ENGLAND, INC.,

Petitioner

v.

CLERK-MAGISTRATE OF THE WARE DIVISION
OF THE DISTRICT COURT DEPARTMENT,

Respondent

On Petition for a Writ
of Certiorari to the Supreme
Judicial Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. On August 4, 1986, Raymond Green, a supervisor at Belchertown State School, was murdered on the school campus. Kenneth Phoenix, an employee at Belchertown State School, was arrested on July 3, 1987 and was arraigned in the Ware

District Court on a charge of murder on July 6, 1987. Pet. 41a, 45a (¶¶ 1-2) (Findings of the District Court).

Belchertown is a rural community in western Massachusetts. The murder, and the arrest of the defendant Phoenix after almost a year of investigation, were the subject of numerous newspaper articles and newscasts. Interest in the events of the murder and in the subsequent charge against Phoenix was great in the community. Id. at 45a, ¶ 3.

On July 9, 1987, a search warrant, which had been issued by the Superior Court on July 3 for the search of Phoenix's home, was returned to the Ware District Court. Id. at 41a. On July 10, petitioner's newspaper was denied access to an affidavit which had been submitted in support of the application for the warrant. At petitioner's re-

quest, the District Court held an immediate hearing at which petitioner was represented by counsel. Id. at 41a-42a. The court ruled that the affidavit should be impounded to protect Phoenix's right to a fair trial. Id. at 42a.

2. Petitioner then commenced this action against the Clerk-Magistrate of the Ware District Court, the custodian of the impounded affidavit. An expedited hearing was held, at which Phoenix opposed the release of the affidavit. Id. On August 10, 1987, the court issued a Memorandum of Decision sustaining the order of impoundment. Pet. 41a-47a.

The court found the affidavit supporting the search warrant (which was impounded and was not part of the record on appeal) to be a sixteen-page document with statements, descriptions and allega-

tions gathered during the almost one-year investigation of the murder. The officer who presented the affidavit gathered the information therein from numerous and varied sources in the usual investigative course. The affidavit was support for a request for a search warrant, which requires a level of proof much less than that required of evidence presented in a criminal trial. The nature of investigatory information such as that contained in the affidavit was such that it might be suppressed or excluded as prejudicial. Pet. 45a, ¶¶ 4-7.

The court reasoned that the right to an open, public trial is not diminished by withholding, during the pendency of the criminal case, investigatory material which may or may not be admitted as evidence in the trial. If all of the information in the affidavit is admitted in

evidence during the trial, the public will have immediate access to it at that time. If less than all of the information in the affidavit is admitted in evidence, the public will have access to the remainder when the case is completed. Pet. 46a, ¶ 9.

This Court has recognized a constitutional right to attend criminal trials, see Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986), but the affidavit was "not part of a criminal trial. Rather, it is a pre-arrest document . . . containing descriptions, statements, and allegations compiled by law enforcement officials in the investigation of this murder." Pet. 44a. Moreover, the two-part test of history and function established by this Court as the basis for finding a constitutional right of access,

see 478 U.S. at 8 (quoted at p. 11, infra), was not satisfied:

> Historically, such investigatory materials are not disclosed to the public before the trial. Such disclosures have been deemed not to be in the public interest. Disclosure of such pre-arrest investigatory materials without the procedural protection present in a trial would undermine the integrity of the trial.

Pet. 44a. The court concluded that "[t]he public's right of access to a criminal trial does not include the right to discover pre-arrest investigatory materials presented to the court in an affidavit supporting a request for a search warrant." Id.

After considering the nature of the information in the affidavit and balancing the rights of the newspaper and the accused, and after considering corrective alternatives in securing a fair trial,

the court concluded as a matter of discretion that "justice requires impoundment of the affidavit during the pendency of this case." Id. at 46a-47a.

3. This order was upheld by an intermediate appellate court (Pet. 16a-40a) and thereafter by the Massachusetts Supreme Judicial Court (Pet. 1a-15a). The Supreme Judicial Court ruled that a search warrant affidavit on file with the court is generally a public document, but that courts have inherent discretionary authority to impound such documents in an appropriate case. Pet. 5a-6a. Here, there was good cause to impound the affidavit. Pet. 6a-8a. "Protecting a defendant's right to a fair trial is undeniably a substantial government interest." Pet. 6a, citing Press-Enter-

prise Co. v. Superior Court, 464 U.S. 501, 508 (1984).

The Supreme Judicial Court rejected the newspaper's claim to a First Amendment right of access. Pet. 8a-13a. Applying this Court's two-part test of history and function, see Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (quoted at p. 11, infra), for determining whether such a right attaches to any particular judicial proceeding, the court agreed with the Washington Supreme Court in Seattle Times Co. v. Eberharter, 713 P.2d 710, 105 Wash.2d 144 (en banc 1986), that neither part of the test is satisfied in this context:

> (1) "Unlike trials, the historical record reveals no English or American tradition of public access to search warrants," and (2) "review will occur when the prosecution attempts to introduce, at trial, evidence ob-

> tained as a result of this probable cause determination . . . [and] immediate public access is not required for the effective functioning of the process itself."

Pet. 11a, quoting Seattle-Times, 713 P.2d at 714, 105 Wash.2d at 152-153.

The Supreme Judicial Court concluded that "no constitutionally guaranteed right of access to the affidavit existed at the time the plaintiff requested it." Pet. 12a-13a. The court also concluded that the district judge did not abuse her discretion in impounding the affidavit. The court dissolved the impoundment order, however, as Phoenix had been convicted (on June 3, 1988) of first degree murder, and accordingly "no basis [remained] for the continued impoundment of the affidavit." Id. Pet. 13a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioner relies primarily upon a quartet of cases in which this Court recently has articulated a First Amendment right to attend criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right to attend criminal trial); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (same); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I) (voir dire proceedings as part of criminal trial); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II) (preliminary hearings in California -- "often the final and most important step in the criminal proceeding," 478 U.S. at 12).

In each of those cases, however, the First Amendment claim was a right to attend the judicial proceeding itself. Petitioner here expressly disclaims a right of access to the proceedings at which applications for the issuance of search warrants are considered by the courts. Pet. 7, at n. 4.

Moreover, those cases hold that the existence of a First Amendment right of access with respect to any particular type of proceeding depends upon a two-part inquiry: (1) "whether the place and process have historically been open to the press and general public;" and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise II, 478 U.S. at 8.

These tests are not satisfied when it comes to the issuance of search war-

rants. For obvious reasons, search warrants have never been issued in a public proceeding, and public access to such proceedings would not enhance but would destroy their effective functioning.

Since the First Amendment right to attend criminal trials does not extend to proceedings considering the issuance of search warrants, these cases do not support the newspaper's constitutional claim of access in this case. The rationale of these decisions, which are built upon the presence of both a historical tradition and a functional contribution of public attendance at particular types of criminal proceedings, simply is not fulfilled in this context.

The governing precedent of this Court with respect to judicial documents is, instead, Nixon v. Warner Communications,

Inc., 435 U.S. 589 (1978). Nixon recognized a generalized common-law right to inspect and copy judicial records. 435 U.S. at 597. But that right is not absolute, id. at 598, and "the decision as to access is one best left to the sound discretion of the trial court." Id. at 599. That is precisely what happened here.

Moreover, this Court has ruled that "[t]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979). The impoundment order here is consistent with that injunction and responsive to the underlying constitutional interest of the accused to a fair trial.

II. THE DECISION BELOW IS CONSISTENT WITH THE APPLICATION OF THIS COURT'S DECISIONS BY MOST OF THE COURTS OF APPEALS.

Petitioner asserts that federal courts of appeals have extended the analysis of this Court's quartet of First Amendment access cases (see p. 10, supra) to find a constitutional right of access to judicial records. Pet. 9-10 and n. 7. Generally, however, those courts recognizing a constitutional right of access to judicial documents have based their rulings on a right to attend the underlying criminal proceeding to which the documents relate. E.g., Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (records of acquittals); In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1272 (1988) (pretrial suppres-

sion hearings); In re Washington Post Co., 807 F.2d 383, 389-90 (4th Cir. 1986) (plea and sentencing hearings); In re Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984) (bail hearings); Associated Press v. United States District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (pre-trial proceedings).

Two of the decisions cited by petitioner do purport to analyze the application of a right of access to judicial documents independently of the judicial proceeding to which they relate, but in each case the documents did in fact relate to an open judicial proceeding. United States v. Smith, 776 F.2d 1104, 1111-12 (3rd Cir. 1985) (indictments returned in open court and supplementary bill of particulars); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985)

(trial exhibits). Respondent submits that the analytical extension represented by these cases and proposed by petitioner would apply equally to a wide variety of public documents, far removed from the legitimate historical foundations which underlay this Court's finding of an implied constitutional right of access specifically for criminal trials. In any event, neither case involved disclosure of pre-arrest, investigatory documents.

In In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988), as here, a newspaper appealed from the impoundment of affidavits filed with the court in support of the issuance of a search warrant. The court of appeals upheld the impoundment, a result consistent with the result in

this case. Two members of the panel, however, reasoned that the constitutional right to attend criminal trials extends to provide a right of access to search warrant affidavits. 855 F.2d at 573, 576. (The third member of the panel did not reach this question, id. at 575.) To the extent that this difference in reasoning but not in result presents a real conflict, respondent submits, for the reasons stated above, that it is the analysis in Gunn, and not the decision below, which is a departure from this Court's decisions.

III. THE DECISION BELOW DOES NOT CLOSE THE WARRANT PROCESS TO PUBLIC SCRUTINY.

Under the ruling below, search warrant affidavits are generally available to the press and the public. Although

occasions will continue to arise where particular affidavits are temporarily impounded in order to protect legitimate state interests, e.g., the integrity of an ongoing investigation (as in Gunn) or the accused's constitutional right to a fair trial (as here), the general principle is one of publicity, subject to traditional rules regarding the exercise of a trial court's reasonable discretion when faced with important countervailing interests.

A stricter First Amendment standard for public access to search warrant affidavits is not necessary to preserve the interests served by the Fourth Amendment. The extent to which the issuance of a warrant in a particular case does (or does not) conform to the requirements of the Fourth Amendment may, of course,

be fully explored through a motion to suppress in the criminal case itself. Moreover, the propriety of impoundment of a particular affidavit may, as was done here, be tested through appellate review.

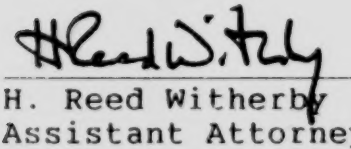
The common law standards for the sound exercise of judicial discretion give substantial weight to the legitimate interests of an open and democratic society in access to information about the operation of its courts. Petitioner has shown no need for imposing a stricter standard through the invocation of the First Amendment.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES M. SHANNON
ATTORNEY GENERAL



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